United States Court of Appeals

SEVENTH CIRCUIT

Case No. 11609

SHELDON M. GRENGS,

Plaintiff-Appellant,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Defendants-Respondents.

Appeal from the United States District Court for the Western District of Wisconsin

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IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of Wisconsin

Civil

No. 2246

SHELDON M. GRENGS,

Plaintiff,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Defendants.

STATEMENT IN ACCORDANCE WITH RULE 10(b)

Time of commencement of the suit: September 12, 1951

Original Complaint filed: September 12, 1951

Amended Complaint filed: December 8, 1954

Answer of Fox Wisconsin Theatres, Inc. and Fox Wisconsin Amusement Corporation to Amended Complaint, filed: December 13, 1954

Answer of Wausau Theatres Company to Amended Complaint, filed: December 16, 1954

Answer of Twentieth Century Fox Film Corporation filed Oct. 31, 1951, and amendment filed December 13, 1954

Answer of Loew's Incorporated filed November 9, 1951, and amendment filed December 13, 1954

Answer of R. K. O. Radio Pictures, Inc., filed November 9, 1951, and amendment filed December 13, 1954

Answer of Warner Bros. Pictures Distributing Corporation filed November 9, 1951, and amendment filed December 13, 1954

Answer of Paramount Film Distributing Corporation filed November 9, 1951, and amendment filed December 13, 1954

Answer of Universal Film Exchanges, Inc., filed November 9, 1951, and amendment filed December 13, 1954

Answer of Columbia Pictures Corporation filed November 9, 1951, and amendment filed December 13, 1954

Answer of United Artists Corporation filed November 9, 1951, and amendment filed December 13, 1954

Order on Separate Trial upon Statute of Limitations, filed: May 5, 1955

Defendants' Motion for Summary Judgment and attached affidavit dated August 24, 1955, and filed August 26, 1955

Motion for Separate Trial on Statute of Limitations filed February 15, 1955

Affidavit of Louis B. Schwartz dated September 15, 1955 and filed September 19, 1955

Order dated September 19, 1955, on Separate Trial upon Statute of Limitations, and filed November 10, 1955

Judgment and Order filed and entered October 4, 1955, granting Summary Judgment as to defendants, Twentieth Century Fox Film Corporation, Loew's Inc., R. K. O. Radio Pictures, Inc., Warner Bros. Distributing Corp., Paramount Film Distributing Corp., Universal Film Exchanges, Inc., Columbia Pictures Corp., and United Artists Corp., and against plaintiff, dismissing Complaint with prejudice.

Notice of Appeal filed October 18, 1955

Cost Bond on Appeal filed October 28, 1955

Statement of Points on which plaintiff intends to Rely filed October 20, 1955

Designation of contents of Record on Appeal filed October 20, 1955

Amended Designation of Contents of Record on Appeal filed November 25, 1955

Time when separate hearing or trial was had on defense of Statute of Limitations: September 19, 1955. Name of Judge presiding: Hon. Patrick D. Stone.

AMENDED COMPLAINT

(Filed December 8, 1954)

Plaintiff for his amended Complaint, herein alleges:

This action is brought under the Anti-Trust Laws of the United States to recover damages sustained as a result of the violations of the Acts of Congress, as hereinafter set forth; and plaintiff respectfully alleges:

1. Each of the defendants is engaged in the transaction of business, or resides, or may be found, or has an agent within the territorial jurisdiction of this Court within the meaning of the Acts of Congress commonly known as the Sherman Act and the Clayton Act, and is engaged in trade and commerce among the several states.

2. The unlawful combination, conspiracy and monopoly hereafter described has operated, and was carried on in part within the Western District of the State of Wisconsin, and many unlawful acts pursuant thereto were performed by defendants and others in State and District. The interstate distribution of motion picture films hereinafter described, was carried on in part within said District.

3. Motion picture films were and are for the most part produced in Hollywood, California, and were distributed through a system of branch offices called exchanges, es-

tablished in various cities of the United States, and were and are shipped to and from and into the various states of the Union, including the Western District of Wisconsin, for licensing and exhibition therein.

4. There were and are eight major film producers and distributors of motion picture films in the United States, to-wit:

Twentieth Century-Fox Film Corporation
Paramount Pictures, Incorporated
RKO Radio Pictures Incorporated
Loew's Incorporated
Warner Bros. Pictures Corporation
Columbia Pictures Corporation
Universal Film Exchange, Incorporated
United Artists Corporation

5. These eight major film producers produced or distributed said film either through their own agencies, or through subsidiary and controlled corporations, and by means of the said exchanges so situated in various cities of the United States.

6. The above named five producers of films, to-wit: Twentieth Century-Fox Film Corporation, Paramount Pictures, Incorporated, RKO Radio Pictures, Incorporated, Loew's Incorporated, and Warner Bros. Pictures Corporation, also were in the business of the exhibition of motion picture films, either directly or through subsidiary or associated companies, in various parts of the United States.

7. Motion picture films were not sold, but were licensed to exhibitors; and the licenses issued by said eight film companies, or their distributing subsidiaries, were and are for the most part uniform, except as to the names and prices of the pictures, and were commonly issued for blocks of films; and each license granted a certain run to the exhibitor, either prior to or subsequent to other exhibits to whom the same films were licensed; and each license fixed a certain clearance or period of time between said runs; and the licenses were granted for a stated sum or for a percentage of the gross receipts of the theatre to which they were licensed.

8. At all of said times, there were a large number of independent theatre owners exhibiting such films, who were not affiliated or associated with said five major producers of films, who, as above stated, own or control and are associated with exhibitors of motion pictures.

9. No independent motion picture exhibitor could operate his theatre or exist in the motion picture business, unless he had available to him licenses from season to season, for the product of a majority of the said eight producers and distributors, either on a first or second run, and only within a reasonable clearance after the prior run, and without discrimination in favor of other exhibitors.

10. Each of the above described conditions existed in the motion picture business at all times mentioned or described in this Complaint.

11. At all of said times, the names and the organization of each of the defendants herein was as follows:

a. Twentieth Century-Fox Film Corporation was and is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 48th Street, New York, New York, and was engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States.

b. Fox-Wisconsin Theatre, Inc., was and is organized and exists under the laws of the State of Delaware, and was then the top operating company in Wisconsin of theatres affiliated with, controlled or operated by any affiliate of Twentieth Century-Fox Film Corporation doing business in Wisconsin or the surrounding territory, and was owned or controlled mediately or immediately by said Twentieth Century-Fox Film Corporation, as its subsidiary; and operated by itself or through its subsidiary corporations, the Fox Theatres in the State of Wisconsin.

c. The Fox-Wisconsin Amusement Corporation was and is a subsidiary of Fox-Wisconsin Theatres, Inc., and was a service corporation handling the booking and buying of films, and other services required by the Fox Theatres in Wisconsin.

d. The Fox-Valley Theatres Corporation, formerly known as Valley Theatres Corporation, was and is a Wisconsin corporation, whose stock was owned 50% by said Fox-Wisconsin Theatres, Inc., and 50% by said Wausau Theatres Company.

e. The Wausau Theatres Company was and is a Wisconsin corporation which owned one of the theatres hereinafter mentioned, and owned 50% of the stock of said Valley Theatres Corporation.

f. The Paramount Film Distributing Corporation was and is a wholly owned subsidiary of Paramount Pictures, Incorporated, and was organized and existed under the laws of the State of Delaware with its place of business at 1501 Broadway, New York, New York and was engaged in the distribution of the pictures produced by said Paramount Pictures, Incorporated, and its said parent company, Paramount Pictures, Incorporated, was also engaged in the business of producing and exhibiting motion pictures through subsidiary, affiliated or associated companies.

g. Loew's Incorporated was and is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and was engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States.

h. RKO Radio Pictures, Incorporated was and is a wholly owned subsidiary of Radio-Keith Orpheum Corporation, and was organized and existed under the laws of the State of Delaware, with a place of

business at 1270—6th Avenue, New York, New York, and was engaged in the production and distribution branch of the motion picture industry.

i. Warner Bros. Pictures Distributing Corporation was and is a wholly owned subsidiary of Warner Bros. Pictures, Incorporated, and existed under the laws of the State of New York, with a place of business at 321—West 44th Street, New York, New York, and was engaged in the business of distributing motion pictures; while its parent company, Warner Bros. Pictures, Incorporated, was also engaged in the exhibition of motion pictures, through itself or through subsidiary or associated companies, as well as in the business of producing motion pictures.

j. Columbia Pictures Corporation was and is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 720-7th Avenue, New York, New York, and was engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States.

k. Universal Film Exchanges, Incorporated, was and is a wholly owned subsidiary of Universal Corporation, and was organized and existed under the laws of the State of Delaware, with a place of business at 1250-6th Avenue, New York, New York, and was engaged in the business of distributing motion pictures.

l. United Artists Corporation was and is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729-7th Avenue, New York, New York, and was engaged in the distribution of motion pictures in the United States.

12. That sometime in May 1942, the plaintiff commenced operating a motion picture theatre in the town of Wausau, Wisconsin, a city or town of about 30,000 population, which theatre was known as the Hollywood Theatre.

13. That said theatre was located upon leased premises, under a lease obtained by the plaintiff, in a building remodeled and equipped at great cost by the plaintiff, and had 674 seats, and was located on Fourth Street, in said town.

14. That at said time there were three other theatres in said town, known as the Wausau, the Grand and the Midway Theatres; the Wausau Theatre was located on Third Street, was owned by the Fox-Wisconsin Theatres, Inc., and was remodeled soon after the Hollywood Theatre was opened; the Grand Theatre was owned by the Wausau Theatres Company, and leased to the Valley Theatres Corporation, whose name has been changed to Fox-Valley Theatres Corporation, and whose stock was owned 50% by Fox-Wisconsin Theatres, Inc., and 50% by the Wausau Theatres Company, and was renovated soon after the Hollywood Theatre opened up, and was located on said Fourth Street; the Midway Theatre was owned by said Valley Theatres Corporation and was leased to the Wausau Theatres Company, and subleased to the said Valley Theatres Corporation, and was operated by Fox-Wisconsin Theatres, Inc., and was located on Scott Street, three or four blocks from the Hollywood Theatre.

15. All of the above three theatres, the Wausau, Grand and Midway, were operated by said Fox-Wisconsin Theatres, Inc., and its subsidiaries.

16. That at all of said times, there existed a combination and conspiracy among the defendant producers, distributors, their affiliates and associates in violation of the Sherman Act, to restrain trade in the business of the exhibition of motion pictures, and to monopolize such business.

17. That said combination and conspiracy was carried out throughout the United States in the following manner:

a. By a uniform system of price fixing, secured by specifying minimum admission charges in the licenses, so as to discriminate against subsequent run theatres in favor of prior run theatres, and especially in favor of theatres owned, controlled by, operated by, or affiliated with one of the producing defendants.

b. By adopting in each locality a uniform and unreasonable system of clearances between runs, and one which operated especially in favor of theatres owned or controlled by or affiliated with one of the producing defendants.

c. By adopting a system of runs and clearances, granting preferred runs and clearance to all theatres which an exhibitor affiliated or associated with any of the said distributors or producers of motion picture films might own, manage or operate, against all theatres in the immediate vicinity, either then or thereafter erected or opened, with the purpose of fixing the run and clearance status of any theatre thereafter opened.

d. By adopting a uniform system of licensing with uniform provisions, by which such clearance was fixed in terms of a given period between designated runs, or in terms of admission prices charged by the competing theatres, or in terms of a given period of clearance over specifically named theatres, or in terms of clearances fixed by other distributors, or in terms of a combination of these formulae, so fixed as to discriminate against independent theatre owners, and prevent their competition with the theatres owned or controlled, or affiliated with, or associated with any of the said motion picture distributors.

e. By entering into Master contracts and formula deals with large circuits of theatres, especially those controlled by or affiliated with any of the producer defendants, by which the various theatres of such circuits were permitted to allocate playing time and film rentals among the various theatres owned by the circuit, and also to exhibit the films upon such playing time as the owners of the circuit deemed best, and by which any theatres owned or operated by such circuit, either theretofore or thereafter established, were to be given prior and discriminatory runs and clearances, and more favorable and discriminatory prices and terms for the same pictures or films, or of a similar character or quality, and against any theatre either then or thereafter established in competition with any of such theatres, owned, controlled managed or affiliated with such large circuits; and by negotiating and entering into contracts with such circuits for the licensing of films on non-competitive terms or basis,

whereby certain films or an entire group of films were licensed for the entire circuit, or for a large number of the theatres comprising such circuit in different towns or cities, so that the small independent exhibitors could not compete in negotiating for any of such films in competition with such circuit; and by tying up with such contracts all their products or a group of products, so as to afford the theatres of such circuit the power to prevent any individual competitive theatre from obtaining licenses for such product, or part of such product, or certain runs of such product, and also by discriminating in their practices under their said Master agreements, contracts, or franchises, or licenses in favor of such theatres, either then or thereafter owned by such circuit, and against competition to their theatres.

f. By granting franchises for a number of seasons or years to exhibitors, especially those affiliated with, or controlled or owned by one of the distributor defendants.

g. By contracting for and licensing the product of producers or distributors, or part thereof, to a circuit of theatres controlled by or affiliated or associated with one of such producers or distributors, whereby such product was licensed to or contracted for a number of theatres owned by such circuits, and whereby such product was also at approximately the same time, contracted for or licensed to a number of theatres owned by another circuit affiliated with or controlled by the same producer, and operating in another part of the United States, so that the one license and its provisions were made in consideration of the other, and whereby the group purchasing power of such affiliated or associated circuits were used with crushing power against the independent theatre owner, and resulted in licenses and runs and clearances being granted on a non-competitive basis, and which prevented the small independent theatre owner from competing with the theatres of such circuit or circuits.

h. By giving preferential, discriminatory and more favorable terms, runs, clearances and prices in their contracts and licenses and franchises to such circuits affiliated with, controlled by, or associated with any of the producers and distributors, and their theatres, which were calculated

to and resulted in the throttling or total elimination of the independent theatres, who were thereby unable to compete with the theatres operated by such circuits.

i. By favorable contract provisions granted, which discriminated against small independent exhibitors and in favor of large affiliated or owned or controlled theatres of distributor defendants, such as suspending the terms of a given contract, if the circuit theatre remains closed for a given period of time, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals, granting moveovers and extended runs; granting unlimited playing time; granting rights to question the classification of features for rental purposes.

j. By entering into agreements with circuit theatres owned or controlled by or affiliated with one of the distributor defendants, by which given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the "pooled" theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages, all for the purpose of eliminating or suppressing competition.

k. By operating agreements entered into between a subsidiary of one of the distributing defendants and one or more independent exhibitors, so as to ally two or more theatres of different ownership into a coalition for the nullification of competition between them, and for their more effective competition against theatres not members of the "pool", and obtaining licenses or contracts from the distributor defendants for films, which provided that the films might be used at either one or more of the pooled theatres, so that if control over one or more of the pooled theatres is lost, the film could be moved over and played at another theatre, and leave the first theatre without films or with insufficient films.

l. By granting more favorable and discriminatory prices and terms for the same pictures or films of a similar character or quality to the competitive theatres owned or con-

trolled by, or affiliated with circuits of theatres affiliated with any of the distributor defendants which was also engaged in the exhibition of motion pictures through subsidiary corporations, and also by discriminating in their practices under their licenses in favor of such competitive theatres and against competition to said competitive theatres.

18. That said combination and conspiracy in the distribution and exhibition of motion pictures was carried out by all of the above named producing and distributing corporations, cooperating to that end throughout the United States, and with the cooperation and consent of their said affiliates, subsidiaries and associated companies, and in part within the said Western District of Wisconsin.

19. That after the plaintiff so began operating his said Hollywood Theatre in said Wausau, Wisconsin, the defendants carried out the said combination and conspiracy which they were then operating throughout the United States, within the said town of Wausau, Wisconsin, in the following manner:

a. They continuously refused to license, or to permit any of the producer or distributor defendants to license to the plaintiff, at his said Hollywood Theatre, any first or second run pictures.

b. That when they did license or permit to be licensed to the plaintiff, at his said Hollywood Theatre, any third run pictures, they would only do so upon prices and terms and such clearances as would discriminate in favor of the theatres owned or controlled by, or affiliated with, the said Fox-Wisconsin Theatres, Inc.

c. Said producer and distributor defendants uniformly discriminated against the plaintiff in their prices and terms, as between films licensed for said Hollywood Theatre and films licensed for said other three theatres.

d. That said producer and distributor defendants licensed pictures for said other three theatres through deals made with the Fox circuit, so operated in Wisconsin by said Fox-Wisconsin Theatres, Inc. and its affiliates on a key formula deal, by which the circuit paid per picture a cer-

tain percentage of the total National film rental received by the distributor on such picture, and by which license or formula deal the said circuit was granted the right to exhibit such pictures on any run in any of its threatres, including first and second runs at any of its said theatres in said Wausau; and by which all second runs were licensed on a flat rental basis when played at said three theatres owned by said Fox circuit, whereas some of the pictures licensed to be played at said Hollywood Theatre, were licensed on a percentage basis, with a minimum guaranteed rental.

e. By said producers and distributors discriminating as to the methods of licensing as between said Hollywood Theatre and said three theatres owned by the Fox circuit, in favor of the Fox circuit, by licensing certain pictures on a flat rental to said three theatres, and refusing to license the same pictures to said Hollywood Theatre, except on a percentage basis.

f. By said producers and distributors imposing unreasonable clearances against said Hollywood Theatre in favor of said three theatres.

g. By said producers and distributors fixing the clearance against the run given said Hollywood Theatre, in terms of a number of days after the preceding run, instead of after the first run (where there was an intervening run), which manner of stating the clearance was calculated to and resulted in further delaying the showing of such films at the said Hollywood Theatre, because the plaintiff was not able to control the availability and exhibition of such films at such intervening run between the first run and the Hollywood's run.

h. By said producers and distributors refusing to enforce against said three theatres of the Fox circuit, provisions contained in their contracts or licenses calculated to fix the time of playing motion picture films in their said respective three theatres, and which provisions are placed in such licenses or contracts for the benefit of subsequent runs, so that even where plaintiff's theatre had a certain clearance or availability after a prior run enjoyed by said Fox theatres, it was of no value to plaintiff, and the pro-

vision for a certain clearance after the prior run was rendered valueless to the plaintiff, because of such refusal on the part of the distributors to enforce the playing of the prior run at a certain specified time, as to the Fox theatres.

i. By said producers and distributors otherwise discriminating in their practices in carrying out the provisions of their various licenses for films as to plaintiff and as to said other three competing theatres, owned or operated by said Fox circuit.

j. By said producers and distributors charging plaintiff more for films licensed to said Hollywood Theatre on a subsequent run than they charged for the same or similar pictures to said Fox circuit for said three theatres.

k. That defendant distributors and producers not only so refused to license their first and second runs as above stated, to the plaintiff for said Hollywood Theatre, but they refused to permit plaintiff to bid for or to compete with said Fox circuits, or to consider any bids that plaintiff offered to make for any of said pictures.

l. By said producers and distributors licensing and permitting to be licensed, their films to said three theatres on a group basis, so that a group of films was licensed to or contracted for such three theatres as a group, and licensed to and contracted for other theatres owned by the same circuit, or by an affiliated circuit to such circuit, also owned or controlled by the same producer or distributor in other parts of the United States, and whereby the purchasing power of such circuit and circuits was used with the purpose and effect of preventing any competition with all the theatres owned by such circuit or circuits, including the said three theatres owned by said Fox-Wisconsin Theatres, Inc., and which resulted in throttling and preventing the competition of plaintiff's said theatre with the said three theatres owned by Fox-Wisconsin Theatres, Inc., and which effectively prevented the plaintiff to obtain or even bid for any of the films so licensed to or contracted for any of said three theatres, or any run so licensed to or contracted for any of said three theatres.

m. That each and every one of the defendants knew the run and clearance granted by every other distributor licensing the same theatres, and knew that the effect of such uniformity was to freeze the playing positions and admission prices of all the theatres in the said town; and each and every one of the defendants cooperated with each other in the above conspiracy for the purpose and with the effect of throttling and destroying the competition of plaintiff's said theatre with the said other three theatres in the said town of Wausau, Wisconsin.

20. That said policy, combination and conspiracy was carried out by the defendants herein pursuant to said National conspiracy hereinbefore alleged, and as part thereof, in a calculated and determined effort to prevent plaintiff from continuing as competitor in said territory, and to throttle and prevent plaintiff's competition with said Fox circuit and its said three theatres, and in a calculated and determined effort to destroy the value of plaintiff's said theatre and its business as competitor in said territory.

21. That plaintiff began operating his said theatre in May of 1942, and continued operating his said theatre until February 16, 1946, when he was compelled to sell the said theatre by reason of and because of said conspiracy; and that as a result of said conspiracy, plaintiff was damaged in the sum of $200,115.00, in loss of profits which he would have made, and of which he was deprived by said conspiracy during the period he so operated, and including the balance of the period to the date when his lease to said land on which the building in which he was operating stood was to expire; and plaintiff was further damaged in the sum of $35,000.00, in being compelled because of such conspiracy to sell his leasehold and business at a less value than it would have been worth in the absence of such conspiracy; and that said theatre was worth $35,000.00 less at the end of the term of said lease because of such conspiracy, than it would have been worth in a free and open market.

22. That on July 20, 1938, a suit in equity was brought by the United States of America against all of the defendant producers and distributors to restrain and enjoin the said

conspiracy; and that in such suit, the Government's complaint prayed for relief and judgment against said defendants who were parties to such suit, and charged that said monopoly, combination and conspiracy, as above described, existed between said producing and distributing defendants and their affiliated circuits and theatres throughout the United States, and prayed that said conspiracy and combination be declared illegal and in violation of the Sherman Anti-Trust Act, and for other relief.

23. That said Government's suit was tried on the merits, and on December 31, 1946, the Trial Court therein, made and entered its final decree and findings, which decree and findings are reported in Volume 70, Fed. Supp., pages 53 to 76 inclusive, and rendered its opinion therein, which opinion is reported in 63 Fed. Supp., pages 323 to 359 inclusive; and that thereupon said defendants, who were parties therein, appealed to the Supreme Court of the United States, and said Supreme Court of the United States affirmed the said judgment and decision on May 3, 1948, in an opinion reported in 68 S. C. R. at pages 915 to 941 inclusive; that subsequently the said Federal District Court which had tried said case, made additional findings and conclusions of law and entered judgments therein, by which it was adjudged and decreed as against the producer and distributor defendants herein, that the monopoly, combination and conspiracy described and charged by the said petition of the United States of America in said suit to exist, and which included the charges set forth herein, did exist, and that the said charges were true and existed throughout the Nation, and within the State of Wisconsin, and that said defendant distributors and producers thereupon, jointly and severally, petitioned the Supreme Court of the United States for Writs of Certiorari, and appealed to said Supreme Court of the United States from said judgments and decrees and findings therein, and said judgments were thereafter affirmed by the Supreme Court on June 5, 1950, and the Supreme Court thereafter refused to issue Writs of Certiorari on said judgment as to all defendant distributors, and thereafter on October 16, 1950, the Supreme Court of the United States denied a petition for rehearing as to all of said defendants; and said judgments have now

become and are final; and said judgments and decrees are and now constitute prima facie evidence in favor of this plaintiff, and against the defendants who were parties to such suit, as to all matters respecting which said judgment or decrees would be an estoppel, as between the parties to said suit and the United States of America; and the running of the Statute of Limitations in respect of the private rights of action in favor of the plaintiff, and against any of said defendants arising under the Anti-Trust Act, and based in whole or in part on any matter complained of in said Government suit, has been suspended during the pendency of said Government suit; all as provided by Title 15, Section 16 U. S. C. A.

Wherefore, plaintiff prays judgment against defendants and each of them, for the sum of $235,115.00 as his damages herein, and that said damages be trebled in accordance with the Sherman and Clayton Acts, that plaintiff have judgment against defendants for the costs of this suit, including reasonable attorneys' fees, all pursuant to the laws of the United States, in such cases made and provided, and that plaintiff have such other and further relief as to the Court may seem just.

DARRELL O. HIBBARD,
S. A. F. Building,
Eau Claire, Wisconsin,
Attorneys for Plaintiff.

LOUIS B. SCHWARTZ and
SAMUEL P. HALPERN,
642 Builders Exchange,
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Of Counsel.

DEMAND FOR TRIAL BY JURY

To the defendants above named:

Plaintiff demands trial by jury of the issues in the above entitled action.

DARRELL O. HIBBARD,
S. A. F. Building,
Eau Claire, Wisconsin,
Attorneys for Plaintiff.

ANSWER OF TWENTIETH CENTURY-FOX FILM CORPORATION

(Filed December 13, 1954)

Comes now the defendant Twentieth Century-Fox Film Corporation, by L. S. Clemons and Lines, Spooner & Quarles, its attorneys, and for its answer admits, denies and alleges:

First Defense

* * * * *

19. Denies the allegations contained in paragraphs 22 and 23 of the Complaint, except it admits that on July 20, 1938, the United States of America instituted a suit under the anti-trust laws of the United States in the United States District Court for the Southern District of New York, being Equity No. 87-273, that Twentieth Century-Fox Film Corporation was a defendant in said case, and respectfully refers this Court to all the proceedings therein for a true and accurate account of said proceedings; and except that Twentieth Century-Fox Film Corporation denies that any statute of limitations has been suspended by said suit and denies that any decree or judgment entered in said suit constitutes an estoppel as between the parties to this action and denies that any decree entered in said suit is admissible in this action.

Second Defense

1. This action was commenced on or about September 12, 1951, against the answering defendant.

2. By virtue of the premises and plaintiff's laches and the provisions of Section 330.19 (4) of the Wisconsin Statutes, all claims accruing prior to September 12, 1945, are barred.

Amended Second Defense

2. Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21 (1), Wisconsin Statutes 1951, or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19(4), Wisconsin Statutes 1951.

ANSWER OF LOEW'S, INCORPORATED

(Filed December 13, 1954)

Now comes Loew's, Incorporated, one of the defendants above named, and for its answer to the Complaint of the plaintiff herein admits, denies and alleges the following:

First Defense

23. Denies the allegations contained in Paragraphs 22 and 23 except that it admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the anti-trust laws of the United States captioned United States of America v. Paramount Pictures, Inc., et al. (Civil Action No. 87-273), that thereafter certain proceedings were taken in said action and certain decrees entered therein but for a true statement as to the nature of said action and the effect of such proceedings and decrees this defendant begs leave upon the trial hereof to refer to the original records of said proceedings now on file respectively with the Clerks of the United States District Court for the Southern District of New York and the United States Supreme Court.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wisconsin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19 (4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF DEFENDANT RKO RADIO PICTURES, INC.

(Filed December 13, 1954)

To the Honorable, the Judges of said Court:

The defendant RKO Radio Pictures, Inc., by its attorneys, Steven E. Keane and Miller, Mack & Fairchild, for its separate answer to the Complaint of the plaintiffs in the above proceeding respectfully represents:

First Defense

15. Paragraphs 22 and 23 of the Complaint: This defendant denies each and every allegation contained in Paragraphs 22 and 23 as it relates or is intended to relate to it, except as expressly admitted herein, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraphs. It admits that on July 20, 1938, the United States brought an anti-trust action which named RKO Radio Pictures, Inc. as a party defendant. It alleges that on November 20, 1940, this defendant entered into a final consent decree with the United States prior to the taking of any testimony, the effect of which was to terminate the action as to it; that on August 7, 1944, the United States petitioned the Court for a modification of said final consent decree; that a trial was conducted with respect to the issues presented in the Government's petition for modification; that a Decree and Findings of Fact and Conclusions of Law were entered therein by the District Court; that said Decree, Findings of Fact and Conclusions of Law were affirmed in part and reversed in part by the United States Supreme Court and that the entire proceeding was remanded to the District Court for reconsideration; that on November 8, 1948, this defendant entered into a final Consent Decree with the United States prior to the taking of any testimony on the remand. This defendant specifically denies that said judgments and decrees constitute prima facie evidence as to it and specifically denies that the running of the statute of limitations has been suspended.

Second Defense

This defendant pleads as an affirmative defense that plaintiff's claim is barred by reason of the applicable statute of limitations of the State of Wisconsin.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF WARNER BROS. PICTURES DISTRIBUTING CORPORATION

(Filed December 13, 1954)

Now comes Warner Bros. Pictures Distributing Corporation, one of the defendants above named, and for its answer to the Complaint of the plaintiff herein admits, denies and alleges the following:

First Defense

23. With respect to Paragraphs 22 and 23 admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the anti-trust laws of the United States captioned United States of America v. Paramount Pictures, Inc., et al. (Civil Action No. 87-273); admits that on December 31, 1946, said District Court issued its findings of fact, conclusions of law and decree which findings, conclusions and decree as modified on February 3, 1947, are reported at 70 Fed. Supp., pages 53 to 76 inclusive; admits that said findings, conclusions and decree were affirmed in part, reversed in part and remanded to the District Court in the opinion of the United States Supreme Court entered on May 3, 1948, and reported in 68 S. C. Rep., pages 915 to 941 inclusive; except as so admitted denies the allegations contained in said paragraphs and in this respect specifically denies that the allegations contained in said paragraphs either completely or accurately describe the nature or the result of the proceedings in United States of America v. Paramount Pictures, Inc., et al.; averring in this respect that all pleadings, proceedings and findings in connection with said ac-

tion are a matter of public record and speak for themselves.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wisconsin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19(4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF PARAMOUNT FILM DISTRIBUTING CORPORATION

(Filed December 13, 1954)

Now comes Paramount Film Distributing Corporation, one of the defendants above named, and for its answer to the complaint of the plaintiff herein admits, denies and alleges the following:

First Defense

23. Denies the allegations contained in Paragraphs 22 and 23 except that it admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the anti-trust laws of the United States entitled United States of America v. Paramount Pictures Inc., et al. (Equity No. 87-273), and that thereafter certain proceedings were taken in said action and certain decrees entered therein and this defendant begs leave to refer to the records and reports of said action for a proper and complete account of said proceedings in the event said proceedings or any of them should become material or relevant to this cause.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wiscon-

sin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19 (4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF UNIVERSAL FILM EXCHANGES, INC.

(Filed December 13, 1954)

Now comes Universal Film Exchanges, Inc., one of the defendants above named, and for its answer to the Complaint of the plaintiff herein admits, denies and alleges the following:

First Defense

23. With respect to Paragraphs 22 and 23 admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the antitrust laws of the United States captioned United States of America v. Paramount Pictures, Inc., et al. (Civil Action No. 87-273); admits that on December 31, 1946, said District Court issued its findings of fact, conclusions of law and decree which findings, conclusions and decree as modified on February 3, 1947, are reported at 70 Fed. Supp., pages 53 to 76 inclusive; admits that said findings, conclusions and decree were affirmed in part, reversed in part and remanded to the District Court in the opinion of the United States Supreme Court entered on May 3, 1948, and reported in 68 S. C. Rep., pages 915 to 941 inclusive; except as so admitted denies the allegations contained in said paragraphs and in this respect specifically denies that the allegations contained in said paragraphs either completely or accurately describe the nature or the result of the proceedings in United States of America v. Paramount Pictures, Inc., et al.; averring in this respect that all pleadings, proceedings and findings in connection with said action are a matter of public record and speak for themselves.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wisconsin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19(4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF COLUMBIA PICTURES CORPORATION

(Filed December 13, 1954)

Columbia Pictures Corporation, one of the defendants above named, as and for its answer to the Complaint herein admits, denies and alleges the following:

First Defense

19. With respect to Paragraphs 22 and 23 admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the antitrust laws of the United States captioned United States of America v. Paramount Pictures, Inc., et al. (Civil Action No. 87-273); admits that on December 31, 1946, said District Court issued its findings of fact, conclusions of law and decree which findings, conclusions and decree as modified on February 3, 1947, are reported at 70 Fed. Supp., pages 53 to 76 inclusive; admits that said findings, conclusions and decree were affirmed in part, reversed in part and remanded to the District Court in the opinion of the United States Supreme Court entered on May 3, 1948, and reported in 68 S. C. Rep., pages 915 to 941 inclusive; except as so admitted denies the allegations contained in said paragraphs and in this respect specifically denies that the allegations contained in said paragrahs either completely or accurately describe the nature or the result of the proceedings in United States of America v. Paramount

Pictures, Inc., et al.; averring in this respect that all pleadings, proceedings and findings in connection with said action are a matter of public record and speak for themselves.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wisconsin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19(4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ANSWER OF UNITED ARTISTS CORPORATION

(Filed December 13, 1954)

The defendant, United Artists Corporation, by its attorneys, answering the complaint of the plaintiff respectfully denies, admits and alleges the following:

First Defense

Seventeenth: With respect to Paragraphs 22 and 23 admits that on July 20, 1938, the United States of America commenced in the District Court of the United States for the Southern District of New York an action under the anti-trust laws of the United States captioned United States of America v. Paramount Pictures, Inc., et al. (Civil Action No. 87-273); admits that on December 31, 1946, said District Court issued its findings of fact, conclusions of law and decree which findings, conclusions and decree as modified on February 3, 1947, are reported at 70 Fed. Supp., pages 53 to 76 inclusive; admits that said findings, conclusions and decree were affirmed in part, reversed in part and remanded to the District Court in the opinion of the United States Supreme Court entered on May 3, 1948, and reported in 68 S. C. Rep., pages 915 to 941 inclusive; except as so admitted denies the allegations contained in said paragraphs and in this respect specifically

denies that the allegations contained in said paragraphs either completely or accurately describe the nature or the result of the proceedings in United States of America v. Paramount Pictures, Inc., et al.; averring in this respect that all pleadings, proceedings and findings in connection with said action are a matter of public record and speak for themselves.

Second Defense

Alleges that the claim in this action is in the alternative either barred by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.21(5) Wisconsin Statutes 1945 or limited by the Statutes of Limitations of the State of Wisconsin and particularly by Section 330.19(4) Wisconsin Statutes 1949.

Amended Second Defense

[Same as Second Amended Defense above.]

ORDER ON SEPARATE TRIAL UPON STATUTE OF LIMITATIONS

(Filed May 5, 1955)

This action having been brought September 12, 1951, under the anti-trust laws of the United States in which plaintiff, under §15, Title 15, U. S. C. A., seeks threefold damages, and all defendants having pleaded that the plaintiff's cause of action was barred by §330.21 or, in the alternative, §330.19(4), of the Wis. Stats. of 1951, and the defendants having moved for a separate trial upon the defense of the Statute of Limitations so that an advance determination could be made as to which statute is applicable, and the Court having heretofore ordered such separate trial and the parties having submitted their briefs, and the matter having come on for hearing before the Court at Wausau, Wisconsin, on April 25, 1955, plaintiff appearing by Louis B. Schwartz, his attorney, defendant Wausau Theatres Company appearing by George L. Ruder, its attorney, defendants Fox Wisconsin Theatres, Inc. and Fox Wisconsin Amusement Corporation, appearing by Lines, Spooner & Quarles, represented by Lester S. Clem-

ons and Laurence C. Hammond, Jr., their attorneys, and the remaining defendants appearing by Fairchild, Foley & Sammond, represented by Steven E. Keane and James P. Brody, their attorneys, and the matter having been argued orally (the defendants contending that §330.21 is applicable, and the plaintiff that only § 330.19(4) is applicable) and the Court being well and sufficiently advised,

Now, therefore, it is hereby found and determined that §330.21(1), Wis. Stats. of 1951 is applicable to this action, it being one by a private party upon a statute penalty and accordingly, that plaintiff's cause of action is barred as to all defendants except to the extent that the running of § 330.21(1) may have been suspended or tolled.

In the event the plaintiff and each of the defendants are unable to stipulate as to the effect of the foregoing ruling upon the cause of action against such defendant, the Court will set the matter down for further hearing and taking of any necessary testimony.

Upon the filing of appropriate stipulations or a further hearing, the Court will enter an order dismissing or limiting this action as to the appropriate defendants.

Dated May 5, 1955, at Wausau, Wisconsin.

Enter:

PATRICK T. STONE,
District Judge.

MOTION FOR SUMMARY JUDGMENT

(Filed August 25, 1955)

Twentieth Century-Fox Film Corporation, Loew's, Incorporated, RKO Radio Pictures, Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, some of the defendants above named, by their attorneys, Steven E. Keane, James P. Brody, and Fairchild, Foley & Sammond, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judg-

ment for the said defendants dismissing the above action on the ground that said defendants are entitled to a judgment as a matter of law for the reason that the plaintiff's alleged cause of action, which relates to the period May 12, 1942, to February 16, 1946, is completely barred by the applicable statute of limitations, to-wit, Sec. 330.21(1), Wisconsin Statutes, as appears from the pleadings on file in this action, and the affidavit of James P. Brody attached hereto and made a part hereof.

Dated at Milwaukee, Wisconsin, this 24th day of August, 1955.

STEVEN E. KEANE,
JAMES P. BRODY,
FAIRCHILD, FOLEY & SAMMOND,
Attorneys for Twentieth Century-Fox Film Corporation, Loew's, Incorporated, RKO Radio Pictures, Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

AFFIDAVIT

(Filed August 26, 1955)

State of Wisconsin
ss.
Milwaukee County.

James P. Brody, being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys for the distributor-defendants hereinabove named.

2. That the Complaint herein was filed with the Clerk of Court and the summons issued on September 12, 1951.

JAMES P. BRODY.

Subscribed and sworn to before me this 19th day of August, 1955.

DOROTHY A. DALEY,
(Notarial Seal) Notary Public,
Milwaukee County, Wis.

My commission expires June 14, 1959.

MOTION FOR SEPARATE TRIAL

(Filed February 15, 1955)

On the pleadings herein filed all of the defendants move that, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the Court order a separate trial by the Court (in advance of the trial of other issues) of the legal defense based on the statute of limitations which is pleaded in the answers of the defendants, to determine whether the applicable statute of limitations is Section 330.21(1), Wis. Stats. (a two-year statute), or Section 330.19(4), Wis. Stats. (a six-year statute).

The grounds of this motion are as follows: the trial of the merits of this case can be expected to take several weeks and will necessitate the expenditure of a substantial amount of time and money in preparation. If it is held that the two-year statute is applicable, various of the defendants will be entitled to a dismissal of the suit as to

them and will not have to participate in any further preparation. Further, a determination in advance of the applicable statute of limitations will be advantageous to the parties who are not discharged, and the Court, in that the period of time for which proof and evidence must be submitted will be decided in advance resulting in increased efficiency in the submission of the case and the conserving of the time of the Court.

GEORGE L. RUDER,
Attorney for Wausau Theatres Company.
L. S. CLEMONS and
LINES, SPOONER & QUARLES,
Attorneys for Fox-Wisconsin Theatres, Incorporated, Fox - Wisconsin Amusement Corporation, Fox-Valley Theatres Corporation.
STEVEN E. KEANE and
FAIRCHILD, FOLEY & SAMMOND,
Attorneys for Twentieth Century-Fox Film Corporation, Loew's, Incorporated, RKO Radio Pictures, Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

AFFIDAVIT

(Filed September 19, 1955)

State of Minnesota,
ss.
County of Hennepin.

Louis B. Schwartz, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above action.

The Complaint herein was filed and the summons issued on September 12, 1951.

That the first judgment of the Expediting Court in United States v. Paramount Pictures, Inc., et al., referred to in paragraphs 22 and 23 of plaintiff's Amended Complaint appears in 70 Fed. Supp. 53.

That after the reversal of said judgment by the Supreme Court of the United States, said Expediting Court, on July 25, 1949, rendered an opinion recorded in 85 Fed. Supp. 881, wherein at page 885 of that volume, it notes that the case was sent down to it by the Supreme Court for "reconsideration of monopoly caused by vertical integration." and that after further evidence, it found that the theatre holdings of the major defendants played a vital part in such monopoly (see page 887 of that volume); and said Court thereupon, at page 900, ordered the defendants and the plaintiff to submit proposed amended decrees and findings on or before September 20, 1949.

That thereafter, on February 8, 1950, said Expediting Court made new Findings of Fact and Conclusions of Law in said case, and on the same date, February 8, 1950, entered separate final decrees, all dated February 8, 1950—one as to Loew's Incorporated, Warner Bros. Pictures, Inc., Warner Bros. Distributing Corporation (formerly known as the Vitagraph, Inc.), Twentieth Century Fox Film Corporation, and National Theatre Corporation; and one as to Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation; that thereafter Warner Bros. Pictures, Inc., and Warner Bros. Pictures Distributing Corporation entered into a consent judgment as to the Warner defendants on January 1, 1951; and said judgment and decree became final as to the Warner defendants on said last mentioned date.

That Loew's Incorporated appealed from the judgment as to it, and said judgment was affirmed by the Supreme Court of the United States on June 5, 1950, and rehearing denied on June 29, 1950, and the mandate of the United States Supreme Court was filed on July 8, 1950, and the second petition for rehearing denied on October 16, 1950,

all in the appeal as to Loew's, Warner Bros. and Twentieth Century Fox.

That the appeal time expired for United Artists, Columbia, Universal and Warner Pictures Distributing Corporation on April 8, 1950.

That in verification of the above dates, affiant refers to tables appearing in Christensen v. Paramount Pictures, Inc., et al., 95 Fed. Supp. 446, at page 452; and to Manny v. Warner Bros., 110 Fed. Supp. 807 at 808; and to Leonia v. Loew's Incorporated, 117 Fed. Supp., page 747 at 761, showing the dates when the various proceedings were taken in the case of United States v. Paramount and others, which tables and the dates set forth therein as to when the various proceedings mentioned therein occurred, are made a part hereof, as if set forth at this point at length.

That affiant makes this affidavit in opposition to the motion made by defendants in the above entitled action for the dismissal of said case because of the running of the statute of limitations of Wisconsin.

LOUIS B. SCHWARTZ.

Subscribed and sworn to before me this 15th day of September, 1955.

ELMA K. ANDERSON,
(Notarial Seal) Notary Public,
Hennepin County, Minn.

My commission expires August 26, 1959.

ORDER DATED SEPTEMBER 19, 1955, ON SEPARATE TRIAL, UPON STATUTE OF LIMITATIONS

(Filed November 10, 1955)

Stenographic Transcript of the oral decision of the Court, the Honorable Patrick T. Stone, Judge, presiding, at a session of said Court held in the City of Madison, in said Western District and State of Wisconsin, on Monday, the 19th day of September, 1955, at 9:00 o'clock in the forenoon, said cause having come on for hearing on motion of the remaining defendants for summary judgment.

Appearances:

Mr. Louis B. Schwartz, attorney for the plaintiff.

Messrs. Fairchild, Foley & Sammonds, by Mr. Steven E. Keane and Mr. James P. Brody, attorneys for moving defendants.

(At the conclusion of arguments of the respective counsel, the Court rendered the following oral decision:)

The Court: The Court is of the opinion that the judgment entered pursuant to the mandate was entered on June 25th, 1948, and that judgment was never vacated with reference to the violations and the findings set forth in that judgment, and which the plaintiff complains of in this action. And the Court is of the opinion that the action was no longer pending, the Paramount case was no longer pending after June 25th, 1948, and that the findings in that judgment were never vacated; and those findings covered the violations complained of in the action now before the Court.

The motion to dismiss because barred by the Statute of Limitations is granted.

Mr. Schwartz: Will it be noted that that is filed as of this hearing—this affidavit?

The Court: What is that?

Mr. Schwartz: This affidavit—

The Court: Is filed now, yes.

Mr. Schwartz: (continuing) —is filed now. O.K.

Mr. Brody: I would like to file with the Clerk a brief amendment of one statement in our brief, your Honor. It doesn't affect this proceeding in any way; it simply simplifies one statement.

The Court: You may file it.

Mr. Schwartz: I want it also noted, your Honor—I don't know whether they are taken down here or not—

The Court: Everything has been taken down by the court reporter.

Mr. Schwartz: Well, then, this should be taken down too: When I admitted that the date of final judgment on Paramount and RKO was a final judgment, I did not by that intend to admit, and do not admit, that the case is outlawed even as to these two.

The Court: Yes.

Mr. Schwartz: Because I am appealing currently—

The Court: The Court didn't take those dates. The Court took the date of June 25th, 1948, in the case as far as the allegations of your complaint with reference to the violations of the Clayton Act. After that date, that case was no longer pending.

Mr. Schwartz: Yes, o.k., just so that's understood.

ORDER GRANTING SUMMARY JUDGMENT

(Filed October 4, 1955)

This cause having come on to be heard on motion of the defendants, Twentieth Century-Fox Film Corporation, Loew's Incorporated, RKO Radio Pictures, Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, for summary judgment on the ground that the plaintiff's alleged cause of action is barred by Sec. 330.21(1), Wis. Stats., and the plaintiff having appeared by his attorney, Louis B. Schwartz, and the defendants by their attorneys, Steven E. Keane and James P. Brody, and oral argument having been made, and it appearing from the pleadings herein that the plaintiff's alleged cause of action accrued no later than February 16, 1946, and it appearing from the affidavit of James P. Brody filed herein that this action was commenced on September 12, 1951, and it appearing therefore that the plaintiff's cause would be wholly barred unless the said statute of limitations was sufficiently tolled or suspended; and the plaintiff by his counsel having contended that the said statute was suspended during the pendency of the government action U. S. v. Paramount Pictures, Inc., 66 F. Supp.

323, 333 (S. D. N. Y., 1946), 70 F. Supp. 53, 71 (S. D. N. Y., 1947), 334 U. S. 131 (1948), pursuant to Sec. 5 of the Clayton Act, and that said action was pending until various dates in 1950 and 1951, and the defendants by their counsel having contended that even if the statute was suspended by the said government case, the action is nevertheless barred because within the meaning of the Clayton Act the government suit became final and ceased to be pending on June 25, 1948, when the District Court made the mandate of the Supreme Court of the United States its order and judgment (and as an additional ground with respect to the defendants, RKO and Paramount, that the said government suit pended as to them at least no later than November 8, 1948, and March 3, 1949, respectively), and the Court having considered the argument herein made and the pleadings, and the affidavit of Louis B. Schwartz herein filed, and it appearing to the Court that the aforesaid government action ceased pending on June 25, 1948, within the meaning of Sec. 5 of the Clayton Act, and that the statute of limitation was not thereafter suspended or tolled and that, there being no dispute or issue as to the time of accrual of the cause or commencement of the action, the said defendants are entitled to a judgment as a matter of law,

It is ordered, adjudged and decreed, that summary judgment be entered in favor of the defendants, Twentieth Century-Fox Film Corporation, Loew's Incorporated, RKO Radio Pictures, Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, and against plaintiff, dismissing the Complaint of the plaintiff with prejudice.

Dated at Madison, Wisconsin, this — day of ————— ———, 1955.

By the Court:

————————,

U. S. District Judge.

NOTICE OF APPEAL

(Filed October 18, 1955)

To Lester S. Clemons, Lines, Spooner & Quarles, 411 East Mason Street, Milwaukee 2, Wisconsin, Attorneys for Fox Wisconsin Theatres, Inc., Fox Valley Theatres Corporation, Fox Wisconsin Amusement Corporation:

To George L. Ruder, 612 First American State Bank Bldg., Wausau, Wisconsin, Attorney for Wausau Theatres Company:

To Steven E. Keane, Fairchild, Foley & Sammond, 735 North Water Street, Milwaukee 2, Wisconsin, Attorneys for the other of the above named defendants:

Notice is hereby given that Sheldon M. Grengs, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the Order and Judgment of the District Court in the above entitled action dated and filed October 4, 1955, granting summary judgment as to the defendants, Twentieth Century Fox Film Corporation, Loew's Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, and against plaintiff, dismissing the Complaint of the plaintiff with prejudice, which judgment was entered in accordance with the Order of the Court dated Sept. 19, 1955, and from the whole thereof.

Dated October 17, 1955.

DARRELL O. HIBBARD,
SAF Bldg., Eau Claire, Wis.
LOUIS B. SCHWARTZ and
SAMUEL P. HALPERN,
642 Builders Exchange Bldg.,
Minneapolis, Minnesota,
Attorneys for Plaintiff-Appellant,
Sheldon M. Grengs.

DESIGNATION OF POINTS ON WHICH PLAINTIFF-APPELLANT WILL RELY

(Filed October 20, 1955)

The points upon which the plaintiff-appellant intends to rely on this appeal are as follows:

1. That Section 330.21(1) Wisconsin Statutes 1951, was not intended to apply, and by its express terms is not applicable to a damage action under the Clayton Act; and the Court erred in its order of September 19, 1955, in holding it applicable.

2. That by the Act of Congress dated October 10, 1942, Ch. 589, 56 Statutes 781, as amended by Ch. 213, on June 30, 1945, by 59 Stat. 306, all statutes of limitations applicable to violations of the anti-trust laws of the United States were tolled from Oct. 10, 1942 to June 30, 1946.

3. That the Court erred in holding that the government suit described in paragraphs 22 and 23 of the Amended Complaint ceased pending on June 25, 1948, within the meaning of the Clayton Act, and in holding that the statute of limitations was not thereafter suspended or tolled as to any defendant.

4. That said government suit described in said paragraphs 22 and 23 of the Amended Complaint was pending as to the defendants-respondents herein until the following dates:

(a) As to Warner Bros. Pictures Distributing Corporation, to January 1, 1951, when it entered into a consent judgment.

(b) As to Twentieth Century Fox Film Corporation, and Loew's Incorporated until Oct. 16, 1950, when their several petitions for rehearing were denied by the U. S. Supreme Court on their several appeals from the judgments entered against them on Feb. 8, 1950.

(c) As to Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, to April 8, 1950, when their time for appeal expired from the judgment entered against them on Feb. 8, 1950.

(d) As to RKO Radio Pictures, Incorporated, to Nov. 8, 1948, when it entered into a consent judgment.

(e) As to Paramount Pictures Distributing Corporation, to March 3, 1949, when it entered into a consent judgment.

5. The Court erred in ordering summary judgment as to the defendants, Twentieth Century-Fox Film Corporation, Loew's Inc., RKO Radio Pictures, Inc., Warner Bros. Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchange, Inc., Columbia Pictures Corporation, and United Artists Corporation, and against plaintiff, dismissing the Complaint of the plaintiff with prejudice.

Dated: October 18, 1955.

DARRELL O. HIBBARD,
SAF Building,
Eau Claire, Wisconsin,
LOUIS B. SCHWARTZ and
SAMUEL P. HALPERN,
642 Builders Exchange Building,
Minneapolis, Minnesota,
Attorneys for Plaintiff-Appellant,
Sheldon M. Grengs.

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed November 25, 1955)

To Lester S. Clemons, Lines, Spooner & Quarles, 411 East Mason Street, Milwaukee 2, Wisconsin, Attorneys for Fox Wisconsin Theatres, Inc., Fox Valley Theatres Corporation, Fox Wisconsin Amusement Corporation:

To George L. Ruder, 612 1st American State Bank Bldg., Wausau, Wisconsin, Attorney for Wausau Theatres Company:

To Steven E. Keane, Fairchild, Foley & Sammond, 735 North Water Street, Milwaukee 2, Wisconsin, Attorneys for the other of the above named defendants:

Appellant designates the following portion of the record and proceedings to be contained in the record on appeal in this action:

1. Amended Complaint.

2. Answers of defendants, Twentieth Century Fox Film Corporation, Loew's Incorporated, RKO Radio Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

2a. Order dated May 5, 1955, on Separate Trial upon Statute of Limitations (designated by Attorneys for Defendants).

2b. Defendants' Motion for Summary Judgment, dated August 24, 1955, and attached affidavit (designated by Attorneys for Defendants).

3. Motion for separate trial on statute of limitations.

3a. Affidavit of Louis B. Schwartz, dated Sept. 15, 1955 (added by Stipulation).

4. Order dated Sept. 19, 1955, on Separate Trial, upon Statute of Limitations.

5. Judgment and Order filed and entered October 4, 1955, granting summary judgment as to the defendants, Twentieth Century Fox Film Corporation, Loew's Inc., RKO Radio Pictures, Inc., Warner Bros. Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, and against plaintiff, dismissing the complaint of the plaintiff with prejudice.

6. Notice of Appeal filed October 18, 1955.

7. Statement of Points on which Plaintiff intends to rely.

8. This designation.

Dated: November 22, 1955.

DARRELL O. HIBBARD,
SAF Building,
Eau Claire, Wisconsin,
LOUIS B. SCHWARTZ and
SAMUEL P. HALPERN,
642 Builders Exchange Bldg.,
Minneapolis, Minnesota,
Attorneys for Plaintiff-Appellant,
Sheldon M. Grengs.

Office-Supreme Court, U.S.
FILED
AUG 8 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1956

NO. 303

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ABRAM F. MYERS
1131 Dupont Circle Building
Washington, D. C.
Counsel for Petitioner

Of Counsel:
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S. A. F. Building
Eau Claire, Wisconsin

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In the
Supreme Court of the United States

OCTOBER TERM, A. D. 1956

NO. ————

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sheldon M. Grengs prays that a Writ of Certiorari issue to review the orders and judgments of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled action on April 16, 1956.

CITATIONS TO OPINIONS BELOW

There were two appeals in this case, one numbered 11548, and one numbered 11609. Both appeals were consolidated by the court below, and are here together, but one opinion only was rendered, which is reported in 232 Fed.

(2) 325. A copy of the opinion and the judgment on each appeal are hereto attached as appendixes B., C. and D.

JURISDICTION

The judgment in appeal numbered 11548 was entered April 16, 1956, the Petitioner's petition for rehearing in both cases by one petition was filed April 30, 1956, and the order denying the petition for rehearing was entered May 17, 1956.

In appeal numbered 11609, the judgment was entered April 16, 1956, Respondents' petition for rehearing was filed April 30, 1956, and the order denying their petition for rehearing was entered May 17, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1); and of the U. S. District Court, by Title 15, Sec. 15, U. S. C. reading:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

QUESTIONS PRESENTED

1. Whether an action for damages under Sec. 15, Title 15, U. S. C. is a statutory penalty, under either Wisconsin or federal law.

2. Whether the nature of the Clayton action is to be determined by Federal law or State law.

3. Whether the limitation to such an action is the 2 year Statute of Wisconsin, made applicable "to an action by a private party upon a statute penalty or forfeiture, when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a

different limitation;" or is governed by the 6 year statute of Wisconsin, made applicable both "to an action upon a liability created by statute, when a different limitation is not prescribed by law," and "to an action to recover damages for an injury to property, real or personal, or for an injury to the person, character, or rights of another, not arising on contract, except when a different limitation is expressly provided for."

STATUTES INVOLVED

The statutory provisions are 330.19, subs. 4 and 5, and 330.21, sub. 1, *Wis. Stats. 1951*, pp. 3190-91 and 3192-93, and 330.51 *Wis. Stats. 1951*, p. 3196; and the Survival Statute of Wisconsin 331.01 and 331.02, *Wis. Stats. 1951*, p. 3197. They are printed in Appendix A, *infra*, pp. 20 and 21.

STATEMENT

This action was commenced September 10, 1951 (R. p. 23 in No. 11548).

The Petitioner, in his amended complaint (R. pp. 2 to 16 in No. 11548) and (pp. 3 to 17 in No. 11609) sets forth that he commenced operating a motion picture theater in Wausau, Wisconsin, in May, 1942, and continued in operation until February 16, 1946, when he was compelled to sell his theater by reason of a conspiracy and combination in restraint of trade existing between all of the Respondents, carried out nation wide by means of refusing certain runs to competitors, discriminatory clearances and prices and other monopolistic practices.

He also alleged the tolling provisions of Title 15, Sec. 16 U. S. C., as to limitation statutes, by reason of the pendency of the government suit brought in 1938 as to all respondents who were parties to that government suit.

Each distributor and three of the exhibitors pleaded the 2 year statute of limitations of Wisconsin.

Respondents made a motion for summary judgment, and Petitioner filed an affidavit that in the government suit, Warner Bros. Pictures Distributing Corporation entered into a consent judgment on January 1, 1951; that the judgment against Loew's Inc. and Twentieth Century Fox was affirmed by the Supreme Court on appeal on June 5, 1950, and rehearing denied June 29, 1950, and a second petition for rehearing denied on October 16, 1950; and that the appeal time expired for United Artists, Columbia, and Universal on April 8, 1950 (R. pp. 30-31 in No. 11609).

On June 21, 1955, the district court ordered the action dismissed as to the exhibitor Respondents without prejudice as to the Petitioner's cause of action against producer and distributor Respondents, on the filing of a stipulation in which Petitioner agreed that the exhibitors were not parties to the government suit (R. p. 22 in No. 11548).

On October 4, 1955, the district court entered summary judgment dismissing the action as to distributor Respondents with prejudice on the ground that it was barred by the Wisconsin 2 year statute of limitations (R. p. 34 in No. 11609).

Petitioner appealed from the order of dismissal and judgment to the Court of Appeals for the Seventh Circuit separately, under Nos. 11548 and 11609. The Court of Appeals consolidated the two appeals and rendered one opinion, affirming the district court's order dismissing the action as to the exhibitor Respondents, but reversed the district court judgment as to all the distributor Respondents, except RKO Radio Pictures, Inc., and Paramount Film Distributing Corporation, which two Respondents had entered into consent decrees on November 8, 1948, and March 3, 1949, antedating commencement of this action by more than 2 years. As to them the order and summary judgment of the district court was affirmed. As to the other distributor Respond-

ents (appellees in No. 11609) the order and summary judgment of the district court dismissing Petitioner's complaint with prejudice, was reversed, on the ground that the government suit had not terminated as to them more than 2 years prior to the commencement of this action (Opinion, p. 26, Appendix B).

The Court of Appeals based its decision that the 2 year statute was applicable, on its opinion that an action for damages under the Clayton Act is an action for a statute penalty, without disclosing the reasons for that opinion. (It merely states: "So read, an action for a statute penalty, *such as in the case at bar,* is subject to the two year limitation." Opinion, p. 26, Appendix B.) (Emphasis supplied.) Nor can we tell from reading its opinion whether it was impelled to that conclusion as to the nature of the action from a consideration of Federal law or State law. The court cites no Wisconsin case; *but the Wisconsin Supreme Court did hold in Wogahn v. Stevens,* 236 Wis. 122 (294 N. W. 503) *that the character of a federally created cause of action* as to whether it is penal or not is *to be determined by federal law;* and certainly, *federal law from the United States Supreme Court down, has with almost practical unanimity held the Clayton Damage action remedial and not penal in character. Since there isn't any Wisconsin case which ever held that an action on a statute giving punitive damages in addition to actual damages is governed by its 2 year statute,*[1] the opinion of the Court of Appeals in the

[1]NOTE: The CCA 7th in *Sun Theater v. RKO,* 213 Fed. (2) 254 at 267 said that in deciding *Hoskins v. Truax,* 191 Fed. (2) 912, it was not concerned with the question whether the Clayton action was remedial or penal, but solely because the Illinois Supreme Court had held treble damage actions limited by its 2 year statute of limitations, reading "Actions for damages for an injury, for false imprisonment, or malicious prosecution, or for a statutory penalty." (Ch. 83, sec. 15, *Smith-Hurd* Anno. statutes).

instant case has no foundation either in State law or Federal law, and is in plain contradiction with both the decisions and statutes of Wisconsin, as well as in conflict with the decisions of every Court of Appeals that has passed on that specific question, and with the decisions of this, the United States Supreme Court.

It is obvious, as pointed out in a case quoted in *Electric Theater Co. v. Twentieth Century Fox*, 113 Fed. Supp. 937, at p. 941 that *the rule should be uniform*, for otherwise "a private antitrust suit based upon identical facts might be characterized as penal in one state, as remedial in another, as compensatory in a third, as punitive in a fourth, as an action to enforce a forfeiture in a fifth, as perhaps a hybrid of these in a sixth, etc." This same Seventh Circuit in *Moore v. Backus*, 78 F. 2d 571 at 575 said: "There is nothing in the character of the legal action * * * which rendered it local to the State of Illinois, and the construction * * * is to be determined by the federal court * * * The federal statute * * * 15 U. S. C. * * * is quite general in its nature and its successful enforcement would seem to require a uniform interpretation * * *."

And Judge Murrah, U. S. Circuit Judge, assigned and sitting as U. S. District Judge in *Momand v. Twentieth Century Fox Film Corp.*, 37 Fed. Supp. at 648, pointed out that "the nature, the type, the kind, and the class of the cause of action created by the Sherman Act must be determined by a resort to the decisions of the federal courts," before determining whether it is assignable under state law; and held the right of action created by Sec. 7 of the Sherman Act is not a penalty but remedial; and that there was nothing in the state law which he was considering which forbade the assignment of a remedial action.

The Supreme Court of Wisconsin in *Moorman Mfg.*

Co. v. Industrial Com., 241 Wis. 200, 5 N. W. 2d 743 at 746, laid down the rule for the interpretation of its statutes that "The meaning of a legislative action must be determined from what it says, not by what the framer of the act intended to say or what he thought he was saying"; the exact words of the two sections of the Wisconsin statutes here involved,[2] are

THE SIX YEAR STATUTE OF WISCONSIN IS SEC. 330.19, WISCONSIN STATUTES 1951, AND READS:

> "Within six years.
>
> "3. An action upon any other contract, obligation or liability, express or implied * * *."
>
> *"4. An action upon a liability created by statute, when a different limitation is not prescribed by law.*[3]
>
> *"5. An action to recover damages for an injury to property,* real or personal, *or for an injury to the* person, character, or *rights of another, not arising on contract, except when a different limitation is expressly provided for."* (Emphasis supplied.)

THE TWO YEAR STATUTE OF WIS. IS SECTION 330.21, WIS. STATUTES 1951, AND READS:

> "(1) An action by a private party upon a statute penalty or forfeiture, *when the action is given to the party prosecuting therefor and the state,* except when the statute imposing it provides a different limitation." (Emphasis supplied.)

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[2]NOTE: There are no decisions in Wisconsin, as there were in Illinois—referred to in *Sun Theatre Co. v. RKO*, 213 Fed. (2) 254 at 267 (CCA 7) as requiring a holding that multiple damage actions are held limited by a statute applicable to a "penalty."

[3]NOTE: The exception refers to such statutes as Sec. 330.51, *Wis. Stats.* 1951, (as the next to last section of the *Chapter on Limitations.* Appendix A for full text) and expressly providing a limitation of 6 years after discovery by the aggrieved party of the facts, to certain "liabilities created by statute."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below overrules the three decisions of Wisconsin which have spoken on the question at issue.

It overrules or ignores Wogahn v. Stevens, 236 Wis. 122, 294 N. W. 503, which held that the *character* of a federally created cause of action in its courts as penal or remedial, must be determined by federal law.[4]

It overrules or ignores Killen v. Barnes, 106 Wis. 560 (82 N. W. 536), which, at p. 570, defined a "forfeiture or penalty" as one inflicted by statute for "transgressing its provisions— the recovery for plaintiff's benefit not being limited in any respect by the injury sustained"; and, at page 569, it said:

> "A right of action to recover a penalty does not survive at common law. That is elementary, and certainly there is no statute covering the subject."

It was *elementary* to the Wisconsin court; yet the Court below held the Clayton action a penalty, which *survives at common law,* as this same Circuit held in *Moore v. Backus* (C. C. A. 7), 78 F. 2d 571; and *survives* under *Wisconsin's survival statute, to which Killen v. Barnes expressly referred,* as an action "for all damage done to the property rights or interests of another". Sec. 331.01, *Wis. Stats. 1951,* Appendix A; and Title 15, Sec. 15, U. S. C., which creates the

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[4]Despite this clear command of the Wisconsin Court, the Court below overrules the United States Supreme Court in *U. S. v. Cooper Corporation,* 312 U. S. 600, as well as the decisions of every U. S. Court of Appeals which has spoken on the question, all holding the character of the Clayton action as remedial and not penal.

Clayton action, limits the recovery to "threefold the damages *by him sustained.*"[5]

It overrules or ignores Dutton v. Fowler, 27 Wis. 427, which held that the word "forfeiture" used in these statutes (to which the 2 year statute provides the limitation) meant a "penalty or forfeiture", and that the "penalty" was *"imposed for permitting or suffering certain things to be done";* and pointed out that in these statutes, *"the penalty is given* to whosoever will sue for it", and not "to the person damaged". At p. 432-433, it says:

> "It is not alleged that the plaintiff has sustained any damages or injury by reason of * * *. Here a penalty is imposed for permitting or suffering certain things to be done, and the penalty is given to whosoever will sue for it."[6]

The Court there was interpreting the word "forfeiture" as used in a statute, giving the entire forfeiture to the informer, and said:

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[5]NOTE: The *Killen* case cited as authority the New York case of *Merchants Bank v. Bliss,* 35 N. Y. 412, holding to the same effect. It is therefore significant that *Grover v. Morris,* 73 N. Y. 473, interpreted the words of a limitation statute, from which Wisconsin obviously adopted its two year statute in the following manner. The court quoted the statute as reading:

> "an action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offense."

Interpreting this statute, the Court said:

> "The actions referred to in this section are those which are technically known as qui tam given by statutes for the recovery in whole or in part of a forfeiture or penalty to any person who may sue for the same (3 Bl. Com. 160). The action is not for a penalty or forfeiture given by statute 'to any person who will prosecute for the same' but for a sum of money which can be recovered by the purchaser of the lottery tickets."

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[6]Note the same distinction drawn as in last sentence of quotation from *City of Atlanta v. Chattanooga* (C. C. A. 6) 127 Fed. 23, at 28, *infra,* p. 16, re the Clayton action.

> "As the entire penalty is given to the person who shall enter the complaint, * * * whether the law could be sustained, if a part of the *penalty or forfeiture* recovered was given to the school fund, and the other to the informer * * * cannot arise upon this enactment." (Emphasis supplied.)

Here the Wisconsin Court clearly tells us that "penalty" and "forfeiture" mean the same thing, and that the "penalty" is given to whosoever will sue for it, yet the Court below tells us that since the two words *"penalty" and "forfeiture"* are used, only the *"forfeiture"* and *not the "penalty," is given to the person who will sue for it,* (Opinion, Appendix A, p. 26.), i.e. "to the party prosecuting therefor."

That interpretation has been followed in every decision since.

In *State v. Hayden,* 32 Wis. 663, in an action brought to recover a "forfeiture" we are told p. 668 that "the action is brought to recover the penalty given by the statute."

In *Oshkosh v. Schwartz,* 55 Wis. 483, 487, that court tells us that the action is one "to recover a penalty" because "the statute expressly provides such forfeiture may be recovered in a civil action."

In *State v. Egerer,* 55 Wis. 527-529, that court tells us that it is unnecessary to plead the specific grounds in an action to recover a "forfeiture" under R. S. Sec. 3295, because "the word 'forfeiture' as there employed includes a penalty."

In *State v. Bellman,* 121 Wis. 478, that court tells us that "this is a complaint to collect a forfeiture" but calls it a "penalty" recoverable in a civil action.

In *Milwaukee v. Ruplinger,* 155 Wis. 391-395, the court tells us "the term 'fine' implies *a forfeiture or penalty* collectible by civil action." (Italics supplied.)

A glance at the statutes of Wisconsin, as they read in 1878, at the time the comma (given so much emphasis by

the court below), was present (Opinion p. 25, Appendix B) shows that they uniformly used the two words "penalty" and "forfeiture" in the same section, and often in the same sentence, creating the liability. See, for instance: Revised Statutes Wisconsin 1878:

> Sec. 1231: "and when no other penalty is prescribed * * * such overseer shall forfeit * * * and said supervisors shall * * * prosecute * * * for such penalty."
>
> Sec. 1324: "The owner * * * shall * * * fix therein like penalties * * * and may sue in his own name * * * for any forfeitures * * *"[7]
>
> Sec. 2197: "Every tenant * * * shall forthwith give notice to landlord, under penalty of forfeiting * * *"

Wisconsin Statutes 1951 still continue to do so, for instance:

> Sec. 201.45: "(3) Penalty. Any company or individual * * * shall, for first offense, forfeit $500.00 and for each subsequent violation shall forfeit not less than $1000.00."
>
> Sec. 215.52 (10b): "If any such association shall fail or refuse * * * it shall be subject to a forfeiture * * * and commissioner may maintain an action * * * to recover such penalty."

Wisconsin follows the rule that all statutes relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law; *Adler & Sons Co. v. Maglio,* 198 Wis. 24, 223 N. W. 89; but it would seem impossible to even read the 2 year section, without going back to the statutes and decisions of Wisconsin to find

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[7]NOTE: Since the Wisconsin statutes and Wisconsin decisions both used the words "penalty" and "forfeiture" interchangeably, how could the presence of a comma after the word "penalty" in the 1878 statute (Opinion, p. 4) have any meaning as differentiating between the two words?

out to what liabilities the limitation applied; and since *the Wis. Stats. creating the very liabilities to which the 2 year statute admittedly provides the limitation, and the Wisconsin decisions interpreting those liabilities, all uniformly use the two words "penalty" and "forfeiture"*, it would be exceedingly strange if the limitation statute didn't also use the two words; and instead of the absence of the comma in the 1931 amendment, as the court below held, raising "an ambiguity which justifies us in construing the statute" (Opinion p. 27, Appendix B) it would seem obvious that the reverse must be true. It was the presence of the comma in the 1878 statutes, which created an ambiguity, because it was meaningless then. The Revisor in 1931 cured the ambiguity by striking it out from the 1931 statute, so that it is now plain.

In addition to overruling the 3 direct Wisconsin decisions, the Court below proceeded to overrule or ignore Wisconsin legislation.

Subdivision 4 of the 6 year statute, Sec. 330.19 is plain and unambiguous, and reads:

> "An action upon a liability created by statute, when a different limitation is not prescribed by law."

It is not pretended that any "different limitation" can be applicable, other than the 2 year section, applicable to a "penalty or forfeiture, when the action is given to the party prosecuting therefor and the state".

And *Killen v. Barnes* tells us that the Clayton action is not a penalty, because "penalties do not survive at common law" nor under Wisconsin's survival statutes; while the Clayton action *survives under both;* and in addition, the Clayton damages are not inflicted by statute for "transgressing its provisions, the recovery not being limited in any respect by the injury sustained".

Dutton v. Fowler tells us that "penalty" and "forfeiture" mean the same thing, and that the "penalty or forfeiture" described in these statutes is "given to the informer, or to anyone who will sue for it", without proof of damage or injury. *So that even if the Clayton action were a penalty, it cannot come within the 2 year section, because it is not given to "whosoever will sue for it"*, and certainly not to him and the state; but only to the person damaged, who shows the injury and the amount of damages.

Subdivision 5 of the 6 year statute is equally plain and unambiguous. It reads:

> "An action to recover damages for an injury to property, real or personal, or for an injury to the * * * rights of another, not arising on contract, except when a different limitation is expressly provided for."

This subdivision is broad enough by its terms to cover not only the Clayton action, but such actions as conversion, obstructing water courses, forcible entry and detainer, none of which have a different limitation expressly provided for them. Why then is not that section applicable?

In re Ries Estate, 259 Wis. 453, 49 N. W. 2d 483, that Court said with reference to a Revisor's bill:

> "When a statute is plain and unambiguous, interpretation is unnecessary, and intentions cannot be imputed to the legislature except those to be gathered from the terms of the law * * * Construing the present statute by its own language it appears to us to be plain and unambiguous * * * *we may not go outside the statute to create ambiguity* and then resolve the ambiguity by what we have found outside." (Emphasis supplied.)

The fact that the Clayton action provides treble damages does not take it out of subdivision 5, because all the actions named in subdivision 5 survive under the express provisions of Wisconsin's survival statute, and therefore

cannot be penalties under *Killen v. Barnes, supra; the survival statute merely provides that the treble damages provided for those actions are not recoverable, if defendant dies.* The action survives; and even the treble damages are not affected on plaintiff's death. Sec. 331.02, *Wis. Stats.* 1951, Appendix A page 29. And *Killen v. Barnes* tells us that a penalty dies with the death of *either* plaintiff or defendant,—common law as well as punitive damages.

How then, except by ignoring sub. 5, can the 6 year statute be held inapplicable to an action for "damages for an injury to property, real or personal, or for an injury to the rights of another"?

Obviously then, under *Dutton v. Fowler,* and the cases following it, the comma which disappeared in 1887, was immaterial then, and its insertion now *cannot change the meaning of either subdivisions 4 or 5 of the 6 year section, nor subdivision 1 of the 2 year section, without erasing all the decisions and legislation that went before.*[8]

In addition to the foregoing, if we are to follow the plain command of *Wogahn v. Stevens, supra,* that the character of a federally created cause of action is to be determined *in Wisconsin courts* by a resort to federal decisions, there can be no question that federal law characterizes the Clayton action as remedial and not penal in character, *and would be so construed by Wisconsin courts.*

This action of the court below is in clear conflict with *Erie v. Tomkins,* 304 U. S. 64, 58 S. Ct. 817, where this Court said:

> "Supervision over either the legislative or the judicial action of the state is in no case permissible ex-

[8]The opinion below, Appendix B, disagrees with a Minnesota and a federal case on the value of punctuation; but it fails to mention the Wisconsin cases to the same effect. See *Merrill v. State,* 38 Wis. at 434, and *Jorgenson v. Superior,* 111 Wis. 451, that "punctuation or the lack of it cannot be allowed to override plain rules of construction."

> cept as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and to that extent, a denial of its independence."

2. The decision of the court below that the Clayton Damage action is a statute penalty is a decision of a federal question and is in conflict with the decision of every Court of Appeals that has passed on that question.

The nature of the Clayton Damage action is a federal question,[9] and the law being a general law, there should be a uniform interpretation of its nature or character, for the application of the limitation, the survival and the assignment statutes of the several states; otherwise under identical facts, the cause of action will survive in some states, die with the person of plaintiff or defendant in others, be assignable in some states and not assignable in others.

Barnes Coal Corp. v. Retail Coal Merch. Ass'n (C. C. A. 4), 128 F. 2d 645 (Virginia) at 648:

> "It is well settled that with respect to a cause of action created by Act of Congress, the question of survival is not one of procedure but one which depends 'on the substance of the cause of action'. Schreiber v. Sharpless, 110 U. S. 76, 80, 3 S. Ct. 423 * * * The decision of the Supreme Court in the Erie Ry. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, has no bearing on the matter; for the question is not one as to a state common law rule but as to the interpretation of a federal statute and the consequences which flow from it." (Citing cases.)

At page 650:

> "The test prescribed by the statute of limitations is survivability, and this must mean survivability under the law relating to the cause of action, since no test

[9]NOTE: So held in *Wogahn v. Stevens*, 236 Wis. ~~360~~ 133, as to a federally created cause of action.

of survivability is prescribed by the statute of limitations."

City of Atlanta v. Chattanooga (C. C. A. 6), 127 Fed. 23 at 28:

> "We find ourselves in agreement with the Court below in holding that an action under the seventh section of the Act of July 2, 1890, C. 647, 26th Stat. 210, is not a penal action. The three first sections of the act are undoubtedly penal * * * The seventh section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the 'damages by him sustained', costs of suit, and his reasonable attorney's fees. *The remedy is not given to the public, for no one may bring the action save the person who 'shall be injured' and the recovery is for the sole benefit of the person so injured and suing.*" (Emphasis supplied.)

Sullivan v. Associated Bill Posters and Distributors (C. C. A. 2), 6 F. 2d 1000, at 1009:

> "If a statute which is penal in part gives a remedy for an injury to the person injured, to the extent that it gives such a remedy, it is a remedial statute, irrespective of whether it limits the recovery to the amount of the actual loss sustained, or as cumulative damages as compensation for the injury."

Bausch Mch. Tool Co. v. Aluminum Co. (C. C. A. 2), 63 F. 2d 778 at 780:

> "The suit is between private parties, and the enlargement of the damages does not convert it into a prosecution for a penalty. Brady v. Daly, 175 U. S. 148, 20 S. Ct. 62. While it is true, the statute trebles the damages found by a jury, yet to succeed a plaintiff must prove damages, and there is no fixed penalty named in the statute."

Hicks v. Bekins Moving & Storage Co. (C. C. A. 9), 87 F. 2d 583 at 585:

"An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty."

Burnham Chemical Co. v. Borax Consolidated, Ltd., et al. (C. C. A. 9), 170 F. 2d 569-571:

"We think there can be no doubt that appellant's action should be regarded as an action at law for damages predicated upon a liability created by statute * * * The damage for which a recovery is allowable is the damage which the suitor has suffered as the result of acts of the conspirators directed against him and committed in the course of the conspiracy and in furtherance of its purpose."

At page 572, the decision sets out the statute of limitations there involved as:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

In *Suckow Borax Mines Consol. v. Borax Consol.* (C. C. A. 9), 185 F. 2d 196 at 207:

"All parties agreed that the three year statute of limitations found in Sec. 33-(1) of the California Code of Civil Procedure 'actions upon a liability created by statute' applies to an action of this character."

State of Oklahoma ex rel. Phillips, Governor v. Am. Book Co. (C. C. A. 10), 144 F. 2d 585 at 587:

"The action in behalf of private persons was to recover treble damages under the Federal Anti-Trust Act. It was predicated upon a liability created by statute. The state law of limitations is controlling."

The two sections of the statutes of Oklahoma read as follows:

"Within three years. An action upon a liability created by statute, other than a penalty or forfeiture."

> "Within two years. An action upon a statute for a penalty or forfeiture, except where the statute imposing it provides a different limitation."

3. The decision of the court below that the Clayton Damage action is a penalty conflicts with the decisions of this, the United States Supreme Court.

U. S. v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742 at 745, construing the Clayton Damage section:

> "It seems evident that the Act envisages two classes of actions, those made available only to the government, which are provided in detail, and in addition, a right of action for treble damages granted to redress private injury."

Meeker v. Lehigh Valley, 263 U. S. 412, 35 S. Ct. 328:

> "The words 'penalty or forfeiture' in Rev. Stats., Sec. 1047, which place a limitation upon any 'suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States', refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act is a public offense and punishable as such."[10]

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[10]NOTE: The same distinction is drawn in *Killen v. Barnes*, 106 Wis. at p. 570, between a "remedial" statute and "liability without regard to actual damages"; and in *Dutton v. Fowler*, 27 Wis. at p. 432, 433, between damages "to person injured" and one given as punishment to "whosoever will sue for it".

CONCLUSION

For the foregoing reasons, this petition of certiorari should be granted.

Dated: July 25, 1956.

Respectfully submitted,

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APPENDIX A

Wisconsin Statutes 1951, pp. 3190-3191. 330.19 Within six years; foreign limitation; notice of injury. Within six years:

(1) An action upon a judgment of a court not of record.

(2) An action upon any bond, coupon, interest warrant or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this state.

(3) An action upon any other contract, obligation or liability, express or implied, except those mentioned in sections 330.16 and 330.18.

(4) *An action upon a liability created by statute when a different limitation is not prescribed by law.* (Emphasis supplied.)

(5) *An action to recover damages for an injury to property, real or personal, or for an injury to the* person, character or *rights of another*, not arising on contract, except in case where a different period is expressly prescribed. * * * (Emphasis supplied.)

(6) An action to recover personal property or damages for the wrongful taking or detention thereof.

Wisconsin Statutes 1951, pp. 3192-3193. 330.21 Within two years. Within two years:

(1) An action by a private party upon a statute penalty or forfeiture, *when the action is given to the party prosecuting therefor and the state*, except when the statute imposing it provides a different limitation. (Emphasis supplied.)

(2) An action to recover damages for libel, slander, assault, battery or false imprisonment. * * *

LIMITATIONS, *Wisconsin Statutes 1951*, p. 3196.

330.51. What actions not affected. This chapter shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a liability created by law; but such actions must be

brought within six years after the discovery by the aggrieved party of the facts upon which the forfeiture attached or the liability was created.

SURVIVAL STATUTES, *Wisconsin Statutes 1951*, p. 3197.

331.01 What actions survive. In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or other damage to the person, *for all damage done to the property rights or interests of another*, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate. (Emphasis supplied.)

331.02 Measure of damages against executor. When any action mentioned in Section 331.01 shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken or for the damages actually sustained, *without any vindictive or exemplary damages* or damages for alleged outrage to the feelings of the injured party. (Emphasis supplied.)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 11548, 11609

SHELDON M. GRENGS,
Plaintiff-Appellant,

v.

TWENTIETH CENTURY FOX FILM CORPORATION, et al.,
Defendants-Appellees.

April 16, 1956

Before Finnegan, Lindley and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Appeals were taken by plaintiff from judgment orders of the district court, one of which (in No. 11548) dismissed his action as to the defendants Fox Wisconsin Theatres, Inc., Fox Valley Theatres Corporation, Fox Wisconsin Amusement Corporation and Wausau Theatres Company, herein sometimes referred to as "exhibitors", without prejudice as to plaintiff's cause of action against the remaining defendants, and the other of which (in No. 11609) dismissed plaintiff's complaint with prejudice, as to the remaining defendants, —Twentieth Century Fox Film Corporation, Loew's Incorporated, RKO Radio Pictures Incorporated, Warner Bros. Pictures Distributing Corporation, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation, herein sometimes referred to as "distributors" or "producers". We have consolidated the cases for hearing in this court.

Plaintiff's entire action against all the defendants, both exhibitors and distributors, is contained in his amended complaint. He seeks to recover treble damages and cost of suit, including a reasonable attorney's fee, because of

defendants' alleged violation of the antitrust laws of the United States.[1] He alleges *inter alia* that he was a motion picture exhibitor in Wausau, Wisconsin, that, in a manner which he alleges in detail, four other exhibitors there were affiliated with or controlled by Twentieth Century Fox Film Corporation, one of the distributor defendants, that he was compelled to sell his theatre by reason of a conspiracy and combination in restraint of trade existing between all of the defendants, that this conspiracy and combination were carried out nation wide by means of refusing certain runs to competitors, discriminatory clearances and prices, and other monopolistic practices set forth, all participated in by the producers and distributors as well as their subsidiaries, defendants herein. He also charges that he began operating his theatre in May 1942 and continued operating it until February 16, 1946 when he was compelled to sell it because of said conspiracy, which caused him damage in the loss of profits, etc.

He also alleges that, on July 20, 1938, the United States brought a suit in equity against all of said defendant producers and distributors to restrain said conspiracy; and that, in said suit, the government charges of said monopoly, combination and conspiracy included the charges afterwards set forth in plaintiff's amended complaint; that, after trial, findings and a final decree were entered on December 31, 1946 adjudging the producer and distributor defendants herein guilty of the monopoly, combination and conspiracy existing throughout the nation and within the state of Wisconsin, described and charged by the government in said suit; that, on appeal, the Supreme Court of the United States affirmed on June 5, 1950, and, after denial of petition for rehearing on October 16, 1950, said "judgments" became final. The amended complaint then alleges that said "judgments and decrees" constitute prima facie evidence in favor of plaintiff and against defendants herein who were parties to that suit "as to all matters respecting which said judgment or decrees would be an estoppel, as between the parties to said suit and the United States"; and further that the running of the statute of limitations in respect of the private rights of action in favor of plaintiff and against any of said defendants arising under the

1. 15 U. S. C. A., Sec. 15.

antitrust act, and based in whole or in part on any matter complained of in said government suit, "has been suspended during the pendency of said Government suit; all as provided by Title 15, Section 16 U. S. C. A."

Each distributor and three of the exhibitors pleaded the two-year statute of limitations of Wisconsin.[2]

Defendants made a motion for summary judgment, and plaintiff filed his attorney's affidavit which was considered by the court.[3] On June 21, 1955, the district court ordered the action dismissed as to the exhibitor defendants, without prejudice as to plaintiff's cause of action against the distributor defendants. This followed the filing of a stipulation in which plaintiff agreed that the exhibitors were not parties to the aforesaid government suit.

On October 4, 1955, the district court entered summary judgment dismissing this action as to the distributor defendants with prejudice, on the ground that it was barred by the Wisconsin two-year statute of limitations.[4]

1. It is agreed that the statute of limitations of Wisconsin applies to this case. *There is a sharp difference of opinion between the parties as to which provisions of that statute applies.* Defendants claim that §330.21(1) *Wisconsin Statutes 1951* is applicable. It provides a two-year limitation for:

> "An action by a private party upon a statute penalty or forfeiture when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation."[5]

---

2. Two of the exhibitors informed the court of the dissolution of the fourth exhibitor, *i. e.*, Fox Valley Theatres Corporation. This suggestion has not been challenged and we therefore will ignore that defendant named in the amended complaint.

3. The affidavit stated *inter alia* that Warner Bros. Pictures, Inc. (not a party to this suit) and Warner Bros. Pictures Distributing Corporation entered into a consent judgment on January 1, 1951; "that Loew's Inc. appealed" and the judgment against it was affirmed by the Supreme Court on June 5, 1950, rehearing denied June 29, 1950, and mandate of the Supreme Court filed July 8, 1950, a second petition for rehearing denied on October 16, 1950, "all in the appeal as to Loew's Warner Bros." Pictures, Inc.), "and Twentieth Century Fox; that the appeal time expired for United Artists, Columbia, Universal, and Warner Bros. Pictures Distributing Corporation on April 8, 1950."

4. Sec. 330.21(1), Wisconsin Statutes, 1951.

5. Sec. 330.21(1), Wisconsin Statutes, 1951, page 3192.

Plaintiff claims that §340.19(4)[6] of said statutes is applicable. It provides a six-year limitation for:

> "An action upon a liability created by statute when a different limitation is not prescribed by law."

Obviously, if the two-year limitation applies, the six-year limitation is inapplicable. Hence we shall first consider the claimed applicability of §330.21(1).

At this point we are confronted with a mystery involving a comma, the disappearance of which is established by the legislative history of this section and its predecessors. The comma in question first appeared in 1878, when there was a general revision of the Wisconsin statutes and what is now §330.21(1) appeared in the revisor's bill and in the enrolled bill signed by the governor, as follows:[7]

> "An action upon a statute penalty, or forfeiture when the action is given to the party prosecuting therefor and the state, or to the state alone * * *." Rev. Bill 1878, c. 177, §4224(1).

However, in the process of publication of the revised statutes of 1878, the comma, following the word "penalty", disappeared. Who caused it to disappear and why are matters argued with great earnestness by defendants' counsel. The preface to this publication contains the following statement by the publisher:

> "For such defects as shall be found to have intervened, the shortness of the time allowed us ought to be accepted as a sufficient apology." Wis. Rev. Stat. (1878), p. iv.

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6. This is obviously an error by plaintiff who undoubtedly means Sec. 330.19(4).

7. In its original form the section under consideration appeared in Revised Statutes of 1849, ch. 127, Sec. 22, and read:

> "All actions and suits for any penalty or forfeiture on any penal statute brought by the state, or any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within two years next after the offense is committed, and not afterwards."

The first revision of this section, occurring in 1858, made this section read as follows:

> "* * * (a)n action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, or to the state alone * * *. Rev. Stats. 1858, c. 138, Sec. 19.

In a statutory revision in 1931, the comma after the word "penalty" continued to be absent. That is the situation presented by this appeal. Defendants contend that its absence from the published 1878 revision of the statutes and its continued absence from the 1931 revision were accidental and were due to lack of care rather than because of the intention of the legislature. On the other hand, plaintiff contends that a comma after the word "penalty" would have no meaning. He quotes *Erie R. Co. v. United States*, 240 F. 28, to the effect that the presence or absence of a comma, according to the whim of the printer or proofreader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation. He also cites *King v. Kelly*, 25 Minn. 522 (1879), where, at 525, the court said:

> "The punctuation of a statute is of little or no consequence, being ordinarily the work of clerks and printers."

If these utterances were to be accepted at face value, we might find our court opinions, and in fact our newspapers, written without punctuation. Where this would leave all of us is uncertain. We do not share the disdain of these courts for punctuation. Universal use thereof rebuts the assertion that it is ordinarily the work of clerks and printers. Without the hundreds of punctuation marks in plaintiff's own briefs herein, we would find ourselves stumbling through a morass of mere words. The meaning of an expression by word of mouth is, as we know, clarified by pauses, inflections, and gestures of the face, hands and body, of the speaker. The necessary absence of such meaningful aids to the printed word is, in some measure, overcome by the intelligent use of commas, periods, semicolons and other punctuation marks. They are not the mere playthings of clerks and printers. We believe that punctuation is a useful aid in interpreting the meaning of printed or written language.

In the statute under consideration, the presence of a comma after the word "penalty" clearly confines the clause beginning "when the action is given to the party prosecuting therefor * * *", to the word "forfeiture" *only*. So read, an action for a statute penalty, such as in the case at bar, is subject to the two-year limitation. It should be so read.

Supporting this conclusion are Wisconsin decisions especially dealing with changes made by revisor's bill, such as *Wisconsin Power & Light Co. v. City of Beloit*, 215 Wis. 439, 254 N. W. 119, at 123, where the court said:

> "We must therefore resort to construction to determine what the statute as it now stands means. In so doing we must bear in mind that the change of the statute was effected by a revisor's bill, enacted by chapter 504, Laws of 1929, and that in such bills there is no intent to change the meaning of the statutes revised; and the statute will not be construed as effecting a change in meaning, unless the language used is so clear and explicit as not to be subject to interpretation. If there is any ambiguity in the changed language, it will be interpreted to mean as in the statutes revised. *Oconto County v. Townsend*, 210 Wis. 85, 244 N. W. 761, 246 N. W. 410; *Kugler v. Milwaukee*, 208 Wis. 251, 242 N. W. 481."

In view of the use of both of the words "penalty" and "forfeiture" in this statute, we are of the opinion that the comma was intentionally used therein prior to 1931. No sufficient reason has been advanced to cause us to believe that the omission of the comma after the word "penalty" was intentional.[7a] Its absence, at the most, raised an ambiguity which justifies us in construing the statute, in effect at times material in this case, as requiring an action on a statute penalty to be brought within two years after the action accrues. We, therefore, hold, in No. 11548, that the two-year limitation applies to the cause of action of plaintiff against the exhibitor defendants. Accordingly, as to those defendants the judgment of the district court is correct.

2. For the same reasons the two-year limitation statute likewise applies to the cause of action of plaintiff against the distributor defendants. As to them, the next question is, from what date is the running of the two years statute of limitations computed? Defendants say it is June 25, 1948. Plaintiff says it is February 8, 1950. The date of June 25, 1948 is when the district court entered a decree

7a. Reasoning in an analogous case is convincing; see *United States v. Tot*, 131 F. 2d 261, at 265, note 9. This case was reversed on other grounds in 319 U. S. 463.

on the mandate of the Supreme Court following its decision of May 3, 1948 in *United States v. Paramount Pictures,* 334 U. S. 131. February 8, 1950 is the date on which the district court, after the remandment by the Supreme Court, entered other decrees, which included the matters involved in the remandment. Loew's, Twentieth Century Fox and another[7b] appealed and, on June 5, 1950, the Supreme Court affirmed. On October 16, 1950, the petitions of these three for rehearing were denied. The appeal time expired for United Artists Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corporation on April 9, 1950.

The difference of opinion arises from disagreement of the parties hereto as to the application of the word "pendency" in §16 of the Anti-Trust laws,[8] which at the time relevant to this case, read as follows:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken.
>
> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

All of the dates of February 8, 1950, April 9, 1950 and October 16, 1950 were within two years prior to the filing of the case at bar, *i.e.*, September 12, 1951. The amended

7b. Not a party to the case at bar.
8. 15 U. S. C. A., Sec. 16.

complaint sets forth a right of action arising under the antitrust laws of the United States and, in so doing, duplicates violations of said laws charged against the same distributor defendants in the *Paramount* case. Thus plaintiff sets forth a private right of action which is, at least in part, grounded upon the same matters of which the government complained in the *Paramount* case. To the extent that there is that similitude or duplication of charges of violations of the antitrust laws, the final judgment or decree in *Paramount*, holding that the defendants there violated the antitrust laws, is prima facie evidence here against the defendants in that case who are also defendants in the case at bar,[9] except as to consent judgments or decrees entered before any testimony had been taken. It was the purpose of congress that a person, desirous of taking advantage of the use as prima facie evidence of a judgment or decree rendered in a suit brought by the United States under the antitrust laws, might have an opportunity to do so in a private action commenced after the government's suit had ended, even though his cause of action arose while the latter suit was pending. This is true when the private action is based either *in whole* or *in part* on any matter complained of in the government's suit.

Whether this case was commenced within two years after the termination of the pendency of the *Paramount* case, within §16, requires a reference to the opinion in that case.

There, at 172, the court stated that the findings of the district court were deficient and obscure, in that, "The District Court in its findings speaks of the absence of a 'purpose' on the part of any of the five majors to achieve a 'national monopoly' in the exhibition of motion pictures." The court then said:

> "First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. * * * Second, we pointed out in *United States v. Griffith, ante*, p.

9. Cf. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537, at 543.

100, that 'specific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of 'purpose' the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate §2 of the Sherman Act though it remains unexercised * * * for * * * the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question."

Especially important in this connection is the following statement by the court, at 173:

"Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. * * * Second, a vertically integrated enterprise, like other aggregations of business units *(United States v. Aluminum Co. of America*, 148 F. 2d 416), will constitute monopoly which, though unexercised violates the Sherman Act provided a power to exclude

competition is coupled with a purpose or intent to do so. * * * Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served *(United States v. Aluminum Co. of America, supra,* p. 430), and the leverage on the market which the particular vertical integration creates or makes possible."

At 174, the court said:

"These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside."

The court, having stated, at 175, that the provision of the decree barring the five majors from further theatre expansion should be eliminated, said: "For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem."

The court, at 178, affirmed the judgment below in part and reversed in part, remanding for proceedings in conformity with the opinion.

While we do not hold that the remandment, insofar as it dealt with the *remedy* only, would be significant here, we do believe that, it is significant that the Supreme Court held that the question of an illegal monopoly had not been completely passed upon by the district court. It therefore remanded for further action therein on a part of the monopoly question. The case, as to the latter matter, remained pending until the district court had passed thereon. In other words, there was a part of the violations charged against the distributors which then remained unresolved by the Supreme Court decision. This was included in that part of the case which was reversed and remanded to the district court for further proceedings.

We are confirmed in the correctness of this view by the district court's opinion after remandment.[10] At page 885, that court said:

10. 85 F. Supp. 881.

"As further reasons for directing a reconsideration of the above issues, we were asked to determine whether the vertical integration of the major defendants, which was held not to be unlawful per se, was conceived with an intent to monopolize or was of such a character as to confer a known monopoly power. If the power be established, a specific intent to monopolize need not be shown. * * *"

Again, at page 893, the court said:

"One of the chief matters referred to us by the Supreme Court is the effect of vertical integration upon competition in the industry. While vertical integration would not per se violate the Sherman Act, the Supreme Court has made it clear that if such integration is conceived with a specific intent to control the market or creates a power to control the market which is accompanied by an intent to exercise the power, the integration becomes illegal.

"We are not satisfied that the plaintiff has shown a calculated scheme to control the market in the conception of the defendants' vertical integration, rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. We do not suggest that every vertically integrated company which engages in retraints of trade or conspiracies will thereby render its vertical integration illegal. The test is whether there is a close relationship between the vertical integration and the illegal practices. Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an

attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, a conclusion which requires the elimination of our Findings 152 and 153, as explained above.

"In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point."

Thus it was then for the first time determined that the vertical integrations were active aids to the conspiracy theretofore determined and were therefore violations of the act. The amended complaint herein charges such vertical integrations.

These determinations upon remandment were later embodied in the district court's decrees, entered February 8, 1950. These decrees became final on appeal within two years prior to the filing of the suit at bar. Hence this action was not barred by the statute of limitations, except as to defendants RKO Radio Pictures Incorporated and Paramount Film Distributing Corporation.[11] The latter two defendants entered into consent decrees on November 8, 1948 and March 3, 1949, antedating the commencement of this action by more than two years. As to them the order and summary judgment of the district court is affirmed. As to the other distributor defendants (appellees in No. 11609), the order and summary judgment of the district court, dismissing the complaint of the plaintiff with prejudice, is re-

11. The validity of this exception as to them is expressly recognized by plaintiff's brief.

versed and the cause remanded for further proceedings consistent with this opinion.

As to Fox Wisconsin Theatres, Inc.
Fox Wisconsin Amusement Corporation
Wausau Theatres Company
RKO Radio Pictures Incorporated
Paramount Film Distributing Corporation, *appellees,* Affirmed.
Costs herein, in No. 11548, are taxed against appellant.

As to Twentieth Century Fox Film Corporation
Loew's Incorporated
Warner Bros. Pictures Distributing Corporation
Universal Film Exchanges, Inc.
Columbia Pictures Corporation
United Artists Corporation, *appellees, Reversed and remanded for further proceedings.*
Costs herein, in No. 11609, are taxed against the last above mentioned appellees.

Finnegan, *Judge.* I concur in the result but not with all that is said in the opinion.

A true Copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 16, 1956

Before
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

No. 11548

SHELDON M. GRENGS,
Plaintiff-Appellant,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, as to Defendants-Appellees, Fox Wisconsin Theatres, Inc., Fox Wisconsin Amusement Corporation, Wausau Theatres Company, RKO Radio Pictures Incorporated, Paramount Film Distributing Corporation.

It is further ordered that the costs of this appeal be taxed against plaintiff-appellant.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 16, 1956

Before
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

No. 11609

SHELDON M. GRENGS,
Plaintiff-Appellant,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, ———— Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED as to Defendants-Appellees, Twentieth Century Fox Film Corporation, Loew's Incorporated, Warner Bros. Pictures Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, United Artists Corporation, and that this cause be and the same is hereby REMANDED to the said District Court for further proceedings consistent with the opinion of this Court filed this day.

It is further ordered that the costs of this appeal be taxed against above mentioned Defendants-Appellees.

FILED
SEP 5 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 303

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, FOX-WISCONSIN THEATRES, INCORPORATED, FOX-VALLEY THEATRES CORPORATION, FOX-WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES, INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Respondents in Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 303

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, FOX-WISCONSIN THEATRES, INCORPORATED, FOX-VALLEY THEATRES CORPORATION, FOX-WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S INCORPORATED, RKO RADIO PICTURES, INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Respondents in Opposition

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, rendered upon a consolidation of appeals No. 11548 and No. 11609, is reported at 232 F. 2d 325. The orders of the District Court for the Western District of Wisconsin dismissing Petitioner's cause of action, which were affirmed in part and reversed in part by the decision of the Court of Appeals, are unreported (R. 26, 32-35, in No. 11609; R. 22, in No. 11548).

STATUTES INVOLVED.

A. Wisconsin Statutes.

The only statute directly involved is Subsection (1) of Section 330.21, Wisconsin Statutes (1951), which (with necessary context) provides as follows:

> ". . . Within two years:
>
> (1) An action by a private party upon a statute penalty, or forfeiture when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation."[1]

The Survival Statutes of Wisconsin set forth in Appendix A of the Petition are not involved in this matter; and the provisions of the Wisconsin six-year limitation, Section 330.19(4), Wisconsin Statutes (1951), would be involved only if it were to be ruled that the two-year limitation is inapplicable.

---

[1] Respondents have inserted a comma after "penalty" which does not appear in the present published version of the statute but was included in the statute as enacted in 1878 [see A **Bill to Revise the General Statutes** (1878), p. 947, c. 177 §4224(1)] and was apparently omitted by printer's error. The Court's attention is called to the fact that Section 330.21(1), Wisconsin Statutes, does not contain and never has contained a comma after "forfeiture," such as appears in the version set forth in the Petition on page 7 and in Appendix A. This is the third occasion on which this same misquotation has appeared in the printed briefs of Petitioner in this proceeding and also the third occasion on which it has been specifically called to the attention of Petitioner's counsel.

B. Federal Statutes.

Petitioner's alleged cause of action arises under Section 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C.A. §15 (1951), which provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Also involved herein is the Rules of Decision Act, 62 Stat. 944 (1948), 28 U.S.C.A. §1652 (1950), which provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Greatly diminishing the significance of the decision below, and therefore involved in a determination as to the issuance of the writ, is the recently enacted federal four-year limitation on treble damage actions under Section 4 of the Clayton Act, 69 Stat. 283 (July 7, 1955), 15 U.S.C.A. §15b (Supp., 1955), which reads as follows:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

QUESTION PRESENTED.

The fundamental question presented is whether or not the courts below erred in holding the two-year limitation of Section 330.21(1), Wisconsin Statutes (1951), applicable to Petitioner's action for treble damages under Section 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C.A. §15 (1951), which was commenced against Respondents on September 12, 1951, in the District Court for the Western District of Wisconsin.

STATEMENT OF THE CASE.

The statement of the case in the Petition is generally satisfactory except for the matters set forth on pages 5 (at first paragraph commencing on that page), 6 and 7, which are obviously argumentative and will be answered in the appropriate subdivision of this Brief in Opposition. The statement in the Petition mistakenly describes the date of commencement of the action as September 10, 1951, whereas it was in fact commenced on September 12, 1951 (R. 1, in No. 11548; R. 1, 29, in No. 11609). Petitioner also fails to mention that he unsuccessfully petitioned the Court of Appeals for a rehearing of the very issues which he seeks to have reviewed herein.

ARGUMENT.

The fundamental question at issue is one exclusively of Wisconsin law, *i.e.*, whether or not Wisconsin courts would apply the Wisconsin two-year limitation to an action comparable to the Clayton Act treble damage action. The decision challenged by Petitioner and that of the District Court which it affirms were rendered by federal jurists peculiarly competent in matters of Wisconsin law. Petitioner's attack on that decision is founded upon assertions as to conflict (a) with Wisconsin precedent and (b) with decisions of other federal Courts of Appeals and of the Supreme Court. Proper analysis reveals that the decision not only does not conflict with the Wisconsin cases cited by Petitioner but, in fact, is in accord with a long and unbroken line of Wisconsin decisions. Nor does the decision below conflict with other federal cases cited by Petitioner, which interpret and apply, not the Wisconsin law involved herein, but the different laws of other jurisdictions. Finally, in view of the recent enactment of a federal four-year limitation applicable to Clayton Act treble damage actions wherever they arise, and of the fact that Petitioner's cause is not barred as to all Respondents, the challenged decision is not of sufficient importance to merit issuance of a writ of certiorari.

I. THE DECISION BELOW IS CLEARLY CORRECT AND IN ACCORD WITH WISCONSIN LAW.

Because at the time Petitioner's action was commenced there was no federal statute of limitations applicable thereto, the law of the forum, in this case the State of Wisconsin, determines the governing period of limitation.

> Rules of Decision Act, 62 Stat. 944 (1948), 28 U.S.C.A. §1652 (1950);
>
> *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U.S. 390, 397 (1906).

In challenging Respondents' contention that the two-year limitation of Section 330.21(1), Wisconsin Statutes (1951), is applicable, Petitioner has raised the following objections:

(1) That the Clayton Act treble damage action is not "upon a statute for a penalty" within the meaning of the two-year limitation; and

(2) That, even if it were for a penalty, the two-year limitation applies only "when the action is given to the party prosecuting therefor and the state," whereas a Clayton Act treble damage action is given to private individuals alone.

With respect to the second of Petitioner's objections, as is quite clearly demonstrated in the decision of the Court of Appeals (Petition App. B, pp. 25-27), the punctuation and legislative history of Section 330.21(1), Wisconsin Statutes (1951), irrefutably establishes that the "when" clause modifies only "forfeiture" and that all penalty actions by private parties are embraced within the two-year limitation. Even in the absence of the punctuation relied on in the decision below, the doctrine of the last antecedent, a rule of statutory construction well established in Wis-

consin, would require the interpretive result arrived at by the Court of Appeals and District Court.

Jorgenson v. *Superior,* 111 Wis. 561, 566, 87 N.W. 565 (1901);

Fuller v. *Spieker,* 265 Wis. 601, 605, 62 N.W. 2d 713 (1954);

Wussow v. *State,* 222 Wis. 118, 131, 267 N.W. 56 (1936).

With respect to the first of Petitioner's objections, i.e., that Petitioner's action is not for a penalty within the meaning of Wisconsin's two-year limitation, it is acknowledged that there are no reported decisions of Wisconsin courts construing the Wisconsin Statutes of Limitation on this precise issue. Nevertheless, the Wisconsin Supreme Court has consistently held that multiple damage statutes impose penalties in a long line of cases which clearly indicate that, if confronted with the precise issue at hand, it would hold, *as did the federal courts below,* that the two-year limitation of Section 330.21(1), Wisconsin Statutes (1951), is applicable hereto.

Many of these Wisconsin decisions involved statutory treble damage actions closely comparable to the recovery afforded private parties in treble damage actions under the Clayton Act.

Carter v. *Van Dorn,* 36 Wis. 289, 294 (1874);

Cohn v. *Neeves,* 40 Wis. 393, 398 (1876);

Krom v. *Antigo Gas Co.,* 154 Wis. 528, 536, 140 N.W. 41, 143 N.W. 163 (1913);

Strimple v. *Parker Pen Co.,* 177 Wis. 111, 117, 187 N.W. 1001 (1922);

Oconto County v. *Union Mfg. Co.,* 190 Wis. 44, 47, 208 N.W. 989 (1926);

Fieges v. *Racine Dry Goods Co.,* 231 Wis. 270, 276-77, 285 N.W. 799 (1939);

Chrome Plating Co. v. *Wisconsin Electric Power Co.*, 241 Wis. 554, 561, 6 N.W. 2d 692 (1942);
Reuling v. *Chicago, St. P., M. & O. R. Co.*, 257 Wis. 485, 495, 44 N.W. 2d 253 (1950).

A similar consistency appears in Wisconsin decisions holding statutory actions for double damages to be penal.

Bettys v. *The Milwaukee & St. Paul Ry. Co.*, 37 Wis. 323, 326 (1875);
Voelz v. *Breitenfield*, 68 Wis. 491, 493-94, 32 N.W. 757 (1887);
Calvetti v. *Industrial Commission*, 201 Wis. 297, 300, 230 N.W. 130 (1930);
Zarnott v. *Timken-Detroit Axle Co.*, 244 Wis. 596, 600-602, 13 N.W. 2d 53 (1944).

Moreover, the Wisconsin Supreme Court has invariably held that statutory actions are penal which allow a recovery in excess of or not limited by the damages actually sustained.

Wright v. *The E. E. Bolles Wooden Ware Co.*, 50 Wis. 167, 170, 6 N.W. 508 (1880);
Cotter v. *Plumer*, 72 Wis. 476, 479, 40 N.W. 379 (1888);
Fleming v. *Sherry*, 72 Wis. 503, 509-511, 40 N.W. 375 (1888);
Smith v. *Morgan*, 73 Wis. 375, 378, 41 N.W. 532 (1889);
Killen v. *Barnes*, 106 Wis. 546, 570-572, 82 N.W. 536 (1900).

The simple, straightforward logic of these many Wisconsin decisions is succinctly stated in the following passage from an early opinion:

"* * * When this law gives single damages, it has a single object, and that is to redress the injured party. But when the damages are to be trebled, the object is

> twofold, namely: to redress the injury done, and also to punish the wrongdoer. No other explanation of these provisions is possible * * *'' *Cohn* v. *Neeves*, 40 Wis. 393, 399 (1876).

In view of the array of Wisconsin authorities supporting the decision below, it is most certainly entitled to the deference customarily accorded decisions by Courts of Appeals on matters of local law.

> *General Box Company* v. *United States*, 76 S. Ct. 728, 732, 100 L. Ed. 582, 586 (1956);
>
> *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

Nor can it be emphasized too strongly that the ruling of the Court of Appeals, challenged by Petitioner herein, affirms a decision on an issue purely of Wisconsin law by a District Judge sitting in Wisconsin whose long familiarity with Wisconsin law entitles his opinion to singular respect.

Petitioner insinuates that the issue as to whether or not his action is for a penalty within the meaning of the Wisconsin two-year limitation was not seriously considered below (Petition, p. 5). As a matter of fact, the question was exhaustively briefed in both cases No. 11548 and No. 11609, a total of more than 140 pages being devoted to the point. Much of the oral argument related to this issue; and the sitting judges raised a number of questions concerning it, from which considerable discussion ensued. A photostatic memorandum presented by Petitioner at the hearing dealt further with the issue; and Petitioner's 33-page brief in support of his Petition for Rehearing in the Court of Appeals was devoted almost exclusively thereto. Patently, the Court of Appeals did not and could not have disregarded this voluminous presentation. The conciseness of its holding on the point is simply a reflection of the clarity of the law concerning it.

Petitioner further asserts that one cannot ascertain whether the Court of Appeals

> "* * * was impelled to that conclusion as to the nature of the action from a consideration of Federal law or State law * * *" (Petition, p. 5)

This contention is utterly absurd in view of the crystal clear pronouncements, in recent decisions of the same court on virtually identical issues, that state decisions control the determination of the state limitation applicable to a Clayton Act treble damage action.

> *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. 2d 912, 913-914 (C.A. 7th, 1951), cert. denied 342 U.S. 947 (1952);
>
> *Schiffman Bros.* v. *Texas Co.*, 196 F. 2d 695, 697-698 (C.A. 7th, 1952);
>
> *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 288 (C.A. 7th, 1954).

That the Court of Appeals was completely cognizant of these prior holdings is demonstrated not only by their frequent citation in the briefs submitted to it by both sides, but also by the fact that one of the judges hearing and deciding the case, Judge Lindley, was the author of both the *Hoskins* and *Schiffman* opinions.

II. THE DECISION BELOW IN NO WAY CONFLICTS WITH WISCONSIN LAW.

Prefatory to a specific discussion of the three Wisconsin cases cited by Petitioner as conflicting with the decision of the Court of Appeals, it must be emphasized that none of these decisions construes the Wisconsin Statutes of Limitation or in any way deals directly with the issue of Wisconsin law raised in this case. Moreover, although Petitioner asserts that these three Wisconsin cases were ignored by the

Court of Appeals, all were thoroughly discussed in the briefs submitted below by both sides;[2] and the only reasonable interpretation of the decision below is that the Court of Appeals espoused Respondents' view of these Wisconsin cases, not that it ignored them.

A. Wogahn v. Stevens involved the survivability of a federally created cause of action, an issue which, unlike the question here, is governed by federal law.

Nothing in *Wogahn* v. *Stevens*, 236 Wis. 122, 294 N.W. 503 (1940), supports Petitioner's contention that characterization by federal courts of a federally created cause of action as penal or remedial is governing upon a Wisconsin Court for all purposes (Petition, p. 6). In the *Wogahn* case the Wisconsin Supreme Court simply held that the issue of survivability of a federally created cause of action (i.e., liability under Section 77k of the Federal Securities Act) was a substantive issue to be determined in accordance with federal law, not the law of the forum state. In so holding, the Wisconsin court was bound by *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 66-67 (1913), as it expressly recognizes in the following statement for which the *Vreeland* case is cited as authority:

> "The survivability of the right of action created by act of congress must be determined in accordance with federal law and not the law of the state where the cause of action arose." 236 Wis., at 126.

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[2] At least 16 printed pages of briefing were devoted to **Wogahn v. Stevens**, 236 Wis. 122, 294 N.W. 503 (1940); 27 pages to **Killen v. Barnes**, 106 Wis. 546, 82 N.W. 536 (1900); and 13 pages to **Dutton v. Fowler**, 27 Wis. 427 (1871).

With respect to the determination of the limitation applicable to a federally created action, however, there is no precedent such as the *Vreeland* case binding a state court to follow federal characterization. Rather, it is quite well established that determination of the applicable statute of limitations is a procedural matter with respect to which the state court's interpretation of its limitation statutes is controlling.

Cope v. *Anderson*, 331 U.S. 461, 466-468 (1947);
Russell v. *Todd*, 309 U.S. 280, 291-293 (1940);
Campbell v. *Haverhill*, 155 U.S. 610, 614-616 (1895);
Moores v. *National Bank*, 104 U.S. 625, 629 (1881);
M'Cluny v. *Silliman*, 3 Pet. (28 U.S.) *270, *277 (1830).

Indeed, the Supreme Court has so held with respect to the very federal action in question.

Chattanooga Foundry and Pipe Works v. *Atlanta*, 203 U.S. 390, 397-398 (1906)

There is not even the faintest suggestion in *Wogahn* that, in the absence of a holding comparable to that of the *Vreeland* case, the Wisconsin Supreme Court would do otherwise than follow its own construction of a Wisconsin limitation in applying that limitation to a federally created action. On the contrary, a more recent Wisconsin decision holds that in construing a Wisconsin statute, the Wisconsin court is in no way bound by federal decisions interpreting either federal or Wisconsin statutes.

Wisconsin E. P. Co. v. *Department of Taxation*, 251 Wis. 346, 357, 29 N.W. 2d 711 (1947).

Against a contention that, since the Wisconsin income taxes of a merged corporation paid by the corporation into which it had been merged were deductible by the

second corporation for federal income tax purposes, the same treatment should be afforded federal income taxes for Wisconsin income tax purposes, the Wisconsin Supreme Court ruled as follows:

> "The deduction is dependent upon the construction of Wisconsin statutes. That is a matter for final determination by this court, and we are in no sense bound by federal construction of federal tax laws or by federal construction of state laws for federal income-tax purposes." 251 Wis., at 357.

All that is demonstrated by the Petitioner's attempt to obviate Wisconsin precedent by means of the *Wogahn* case is his own lack of faith in his assertion that a multiple damage statute is not a penalty within the meaning of the Wisconsin two-year limitation.

B. Petitioner's reasoning with respect to Killen v. Barnes is patently fallacious.

Seemingly imbued with the idea that the issue of survivability is somehow germane to the statute of limitations question in this case, Petitioner asserts repeatedly that the lower court ignored *Killen* v. *Barnes*, 106 Wis. 546, 82 N.W. 536 (1900). The *Killen* case holds that the statutory liability of corporate directors for all corporate indebtedness resulting from their violation of the statutory provisions as to payment of dividends constitutes a penalty, and that, therefore, a cause of action based upon such liability does not survive under the common law of Wisconsin. Reasoning fallaciously backward from this holding, Petitioner asserts that since a cause of action for treble damages under the Clayton Act does survive, it must not be a penalty under Wisconsin law.

Petitioner's theory with respect to the *Killen* case is defective for a number of reasons. First, it is obvious that the case does not necessarily stand for the unstated

first premise of Petitioner's syllogism, *i.e.*, that only actions which do not survive are penalties.

Moreover, contrary to Petitioner's claim, an action comparable to a Clayton Act treble damage action would not have survived under Wisconsin law at the time of the *Killen* decision. The *Killen* case itself stands for the proposition that a statutory action for a recovery in excess of actual damages sustained by the party suing therefor is penal and does not survive either at common law or under the Wisconsin Survival Statutes. 106 Wis., at 570-571. A similar holding appears in the earlier decision of *Cotter* v. *Plumer*, 72 Wis. 476, 479, 40 N.W. 379 (1888), which is relied on in the *Killen* case. And in *Murray* v. *Buell*, 76 Wis. 657, 661, 45 N.W. 667 (1890), the Wisconsin Supreme Court held that a tort action for injury to business (in this instance, an action for single damages resulting from a conspiracy to monopolize the coal business of a city) would not survive either at common law or by virtue of the Wisconsin Survival Statute [Wis. Rev. Stat. (1898) §4253].[3] Hence, even under Petitioner's aberrant view of the *Killen* holding, an antitrust treble damage action would be for a penalty under Wisconsin law.

Finally, the *Killen* case does not involve a construction of the Wisconsin Statute of Limitations, but merely a consideration of whether a specific action is penal *under Wisconsin common law* in order to determine its survivability. To the extent, however, that the *Killen* opinion embodies a general definition of penalty for Wisconsin

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[3] As indicative of how the Wisconsin Supreme Court would have applied **Murray v. Buell** to an antitrust treble damage action, it is of interest to note that a Louisiana District Court relied on that case as authority for holding a treble damage action under the federal antitrust laws to be unassignable. **Bonvillain v. American Sugar Refining Co.**, 250 Fed. 641, 643 (E.D. La., 1918).

law, it is highly persuasive that a multiple damage action constitutes a penalty within the meaning of the Wisconsin two-year limitation, as in the following passage:

> "* * * If we test the statute by the familiar rule,—that a statute which imposes a forfeiture or a penalty for transgressing its provisions or doing a thing prohibited (Potter's Dwarris, Stats. 74; 18 Am. & Eng. Ency. of Law, 270) is penal in character, and that if the penalty or forfeiture does not go to the public but to a person individually interested directly in the matter to some extent, the recovery for his benefit not being limited in any respect by the injury sustained by him, showing that the primary purpose of the statute is public, it is nevertheless penal,—we shall have no difficulty in reaching a right conclusion." 106 Wis., at 570.

C. The decision below does not conflict with Dutton v. Fowler.

Petitioner asserts that, in holding that the punctuation of the Wisconsin two-year limitation affords a different treatment to "forfeiture" than to "penalty," the Court of Appeals has ignored *Dutton* v. *Fowler*, 27 Wis. 427 (1871), in which, Petitioner claims, "penalty" and "forfeiture" are held to mean the same thing. The basis for the decision below on this point is fully set forth in the opinion of the Court of Appeals (Petition App. B, pp. 25-27), from which it will be evident that the decision does not depend on the existence of a distinction between the words "penalty" and "forfeiture" throughout all Wisconsin cases and statutes. Although no Wisconsin case holds, as Petitioner claims (Petition, p. 13), that "forfeiture" and "penalty" mean the same thing, there are instances in Wisconsin law in which the two words are used loosely and interchangeably (see cases and statutes cited in Petition, pp. 9-11).

The legislative history of the Wisconsin two-year limitation indicates conclusively, however, that the draftsmen of the 1878 version of the statute [Wis. Rev. Stat. (1878) §4224(1)] did intend to make such a distinction. Indeed, that distinction may have been derived from *Dutton* v. *Fowler,* which antedated the 1878 revision. In *Dutton,* a Wisconsin statute allowing recovery of the entire forfeiture to any person prosecuting therefor was held unconstitutional under the Wisconsin constitutional provision requiring that all money acquired by forfeiture must be paid to the school fund [Wis. Const. Art. X, §2]. The Court proceeded, however, carefully to distinguish the statute before it from those, not subject to the constitutional requirement,

> "* * * which give an action for a prescribed penalty, manifestly as damages or compensation to a party injured." 27 Wis. 427, 432-433.

It is apparent from legislative history that this distinction was incorporated into the Wisconsin two-year limitation in 1878 by using "forfeiture" to describe an action in which, under the Wisconsin Constitution, recoveries may not be given entirely to any party prosecuting therefor, whereas "penalty" describes statutory penalty actions which are permitted to be given entirely to the person injured.

Hence, rather than conflicting with *Dutton* v. *Fowler,* the decision below is entirely in harmony with the distinction made in that case.

D. Petitioner's other assertions of conflict with Wisconsin law are equally erroneous.

Petitioner makes a number of collateral assertions as to Wisconsin law which require correction. One is that the only "penalty" referred to in the Wisconsin two-year limitation is one given to anyone who prosecutes therefor,

i.e., a *qui tam* action (Petition, p. 9). Petitioner cites no authority for this proposition except *Dutton* v. *Fowler* which not only does not construe the two-year limitation but also expressly recognizes that there are statutory actions in Wisconsin, expressly described as "penalties," given only to persons injured by the wrong proscribed. Moreover, the legislative history of the two-year limitation indicates that the word "penalty," as used therein, embraces an action given only to such an injured party. See Wis. Rev. Stat. (1858) c. 138, §19.

Petitioner further states (Petition, p. 12) that in 1931 the Wisconsin Revisor of Statutes "cured" the ambiguity referred to by the Court of Appeals by striking the comma which appeared in the two-year limitation as originally enacted. The ambiguity referred to by the Court of Appeals, however, is the absence of the comma, which appears in the enacted version of the statute, from subsequent published versions (Petition App. B, p. 27). Moreover, the 1931 Revisor did not strike out the comma, as Petitioner asserts. Rather, the comma was omitted by a printer's error in 1878; and this error was continued in all subsequent published versions of the statute. The Revisor's note to the 1931 revision [Revisor's Note, Bill No. 51, S. (May 2, 1931)] and his unpublished correspondence with respect thereto, which were submitted to the Court of Appeals, indicate no intention to accomplish a change in the law such as Petitioner suggests. Indeed, in Wisconsin a Revisor of Statutes is not authorized to suggest changes in the law and a revised statute is presumed not to change the law.

Wis. Stat. (1955) §370.001(7);

Guse v. *A. O. Smith Corp.*, 260 Wis. 403, 406, 51 N.W. 2d 24 (1952);

Wisconsin Gas & E. Co. v. *Ft. Atkinson*, 193 Wis. 232, 245, 213 N.W. 873 (1927).

Finally, Petitioner asserts that in recognizing the significance of the comma in the two-year limitation, the court below ignored Wisconsin precedent holding that punctuation is not significant in statutory construction (Petition, p. 14 n. 8). Actually, the Wisconsin cases cited by Petitioner hold simply that punctuation may not be used to overcome the plainly expressed intention of the legislature or established rules of statutory construction.

Morrill v. *State*, 38 Wis. 428, 434 (1875);
Jorgenson v. *Superior*, 111 Wis. 561, 566, 87 N.W. 565 (1901).

Significantly, the established rule of statutory construction, which the *Jorgenson* case would not permit to be overcome by punctuation, was the doctrine of the last antecedent, under which, *even in the absence of the comma*, the Wisconsin Supreme Court would be bound to hold that the "when" clause of the two-year limitation modifies "forfeiture" only, thus reaching the same result as did the Court of Appeals on the basis of punctuation (see discussion at I, *supra*).

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE FEDERAL CASES CITED BY PETITIONER.

Petitioner cites a number of Court of Appeals and Supreme Court decisions with which he claims the decision below conflicts because such other federal cases hold that a Clayton Act treble damage action is not a penalty. None of these cases, however, purports to construe the Wisconsin two-year limitation; and the decision below merely holds that a multiple damage action, such as is provided in Section 4 of the Clayton Act, constitutes a "penalty" *within the meaning of the Wisconsin two-year limitation as it would be construed by the Wisconsin Supreme Court.*

The allegedly conflicting federal cases cited by Petitioner construe an antitrust treble damage action to be non-penal for other purposes, including the application of different state and federal statutes. Hence, there exists no such conflict as Petitioner claims. An identical contention of conflict among federal decisions with respect to a holding that the Clayton Act treble damage action constitutes a "penalty" within the meaning of the Illinois two-year limitation has heretofore been before the Supreme Court on a petition for certiorari which was denied.

Hoskins Coal & Dock Corp. v. *Truax Traer Coal Co.*, 191 F. 2d 912 (C.A. 7th, 1951), cert. denied 342 U.S. 947 (1952).

Petitioner pleads for uniformity of interpretation or "characterization" of Clayton Act treble damage actions as penal or non-penal, on the ground that otherwise there will be no uniformity with respect to survivability or assignability of such actions. This argument completely ignores the fact that survivability and assignability of an action under the Clayton Act is a federal, not a state question, and that, therefore, uniformity on this issue is reasonably assured.

Michigan Central R.R. Co. v. *Vreeland*, 227 U.S. 59, 66-67 (1913);

Barnes Coal Corp. v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645, 648 (C.A. 4th, 1942);

Sullivan v. *Associated Billposters and Distributors*, 6 F. 2d 1000, 1004 (C.A. 2d, 1925).

As for uniformity in the limitations field, even if the Clayton Act treble damage action had been uniformly characterized as non-penal, the different statutes of limitation of different states would have resulted in a variety of applicable periods of limitation prior to enactment of the federal statute of limitations (see examples cited S. Rep. 619, 84th Cong. 1st Sess. (1955); U.S. Code Cong. & Adm. News, 84th Cong. 1st Sess. (1955) pp. 2328, 2332).

Moreover, Petitioner's plea for uniformity of characterization, like his arguments based on the survivability decisions, overlooks the fact that an action may be characterized as both penal and non-penal, depending upon the difference in the purposes underlying the characterizations. An excellent example of this common judicial phenomenon is the characterization of the antitrust treble damage action as non-penal, within the meaning of the federal five-year limitation [Rev. Stat. §1047; now 62 Stat. 974 (1948), 28 U.S. C.A. §2462 (1950)], in *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U.S. 390, 397 (1906), which was followed only a decade later by *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29 (1916), in which the same action was held to be penal for purposes of determining the right of trial by jury. Both the *Fleitmann* and *Chattanooga* opinions were written by Justice Holmes.

Numerous other federal decisions characterize the Clayton Act treble damage action as penal for a variety of purposes.

E.g., *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 189 (C.A. 2d, 1955), cert. denied 350 U.S. 825 (1955);

Paramount Film Distributing Corp. v. *Applebaum*, 217 F. 2d 101, 105 (C.A. 5th, 1954);

Milwaukee Towne Corp. v. *Loew's, Inc.*, 190 F. 2d 561, 570 (C.A. 7th, 1951), cert. denied 342 U.S. 909 (1952);

Bigelow v. *RKO Radio Pictures*, 150 F. 2d 877, 883 (C.A. 7th, 1945);

Clark Oil Co. v. *Phillips Petroleum Co.*, 148 F. 2d 580, 582 (C.A. 8th, 1945), cert. denied 326 U.S. 734 (1945);

Maltz v. *Sax*, 134 F. 2d 2, 4 (C.A. 7th, 1943);

Decorative Stone Co. v. *Building Trades Council*, 23 F. 2d 426, 427 (C.A. 2d, 1928), cert. denied 277 U.S. 594 (1928).

Yet none of these cases necessarily conflicts with those cited by Petitioner, because the purposes underlying the characterizations are different.

IV. THE DECISION BELOW IS OF EXTREMELY LIMITED SIGNIFICANCE BOTH GENERALLY AND FOR PETITIONER IN PARTICULAR.

A. The recently enacted federal four-year limitation on antitrust treble damage actions greatly restricts the applicability of the decision below.

Effective as of January 7, 1956, all causes of action for treble damages accruing under Section 4 of the Clayton Act, not theretofore barred, are and will be subject to a federal four-year statute of limitations. 69 Stat. 283 (July 7, 1955), 15 U.S.C.A. §15b (Supp., 1955). Hence, the decision below is applicable only to the obviously very limited number of actions under Section 4 of the Clayton Act accruing prior to January 7, 1954 (two years before the effective date of the federal limitation), which might have been commenced in the federal district courts in Wisconsin.

B. The decision below leaves Petitioner's cause of action unbarred as against six out of twelve Respondents.

The effect of the Court of Appeals decision is to bar Petitioner's cause of action as against four exhibitors and two of the eight distributors, RKO Radio Pictures, Incorporated, and Paramount Film Distributing Corporation. Petitioner's alleged cause of action remains unbarred, however, as against the six other distributors, Twentieth Century-Fox Film Corporation, Loew's Incorporated, Warner Bros. Pictures Distributing Corporation, Universal Film Exchanges, Inc., Columbia Pictures Corporation, and United Artists Corporation.

A decision of such limited import, even for the party challenging it, would not appear to merit review upon certiorari.

Rule 19, *Rules of The Supreme Court of the United States* (June 16, 1955).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari in this matter should be denied.

Dated: September 4, 1956.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

NO. 303

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S, INCORPORATED, RKO RADIO PICTURES, INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We pointed out in our Petition that *Wogahn v. Sterens*, 236 Wis. 122, held that the character, as penal or remedial, of a federally created cause of action would be determined in its courts according to the decisions of federal courts. This is in accord with *Prudence Realization v. Geist*, 316 U.S. 89, that "in the interpretation and application of federal statutes, federal not local law applies."

Despite this command of both the State Court and of this, the U. S. Supreme Court, the court below held the Clayton action penal, without giving a reason for its decision, and

notwithstanding the decisions of every other U. S. Court of Appeals to the contrary.

What we failed to note was that the 84th Congress has also noted the need for uniformity in the enforcement of the Clayton Act, by providing a uniform four-year limitation to the Clayton actions by enacting, on July 7th, 1955, Ch. 283, Sec. 1, 69 *Stats.* 283, being 15 *U.S.C.*, Secs. 15(b) and 16(b). By its terms the amendment was not to be effective for six months; and in any event it is not applicable to the present action. *Ochoa v. Hernandez*, 230 U.S. 139.

Since we were not told by the court below how it arrived at its conclusion that the Clayton action is a penalty,[1] we are forced to speculate.

The court lays down two postulates for its decision: (1) that the Clayton action is a penalty; (2) that the word "penalty," as used in the two-year section, is something different from the word "forfeiture," and is not modified by the qualifying phrase, "when the action is given to the party prosecuting therefor and the state."

Both postulates are necessary to its decision. One alone is not sufficient; for if the Clayton action is not a penalty, the two-year statute is concededly not applicable.

Since there are no Wisconsin decisions holding multiple damage actions within the two-year section, as there are in Illinois (involved in *Hoskins v. Truax*), the Court must have adopted the view urged upon it that the action was a penalty because Wisconsin characterized statutory multiple damages as punitive and "penalties." In so doing, it ignored

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[1]In Sun Theatre Co. v. R. K. O., 213 F.2d 284, and Schiffman v. Texas, 196 F.2d 695, the same Court disclaimed that in deciding Hoskins v. Truax, 191 F.2d 912 (cert. den. 342 U.S. 947), it had intended to hold the action was penal within federal definition, but had so decided solely because the Illinois Supreme Court had held all treble damage actions within its two-year statute. There are no such decisions in Wisconsin.

Wisconsin's Survival Statute, under which actions carrying multiple damages given by Wisconsin's statutes for conversion, obstructing water courses, forcible entry and detainer, and other injuries to property, all of which survive with the multiple damages included, except as against the executor of defendant (Appendix A, p. 21), and ignored *Killen v. Barnes*, 106 Wis. 560, which tells us that "a penalty dies with the death of either plaintiff or defendant," and tells us "that is elementary, and certainly there is no statute covering the subject" (referring to the Survival Statute).

But if a penalty dies with the death of either party, and does not survive under Wisconsin's Survival Statute as *Killen* tells us, then the Clayton action can not be a penalty because it survives both at common law and under the express terms of the Survival Statute.

Certainly statutory multiple damages do not die with the death of either party in Wisconsin, because Sec. 331.02 says they are only *not* recoverable against defendant's executor. They survive on plaintiff's death. Secs. 331.01 and 331.02 (Appendix A, page 21), which expressly include not only actions "for all damage done to the property rights or interests of another" (such as the Clayton damages), but actions for conversion, recovery of possession or unlawful withholding of real estate, and others, all of which carry statutory multiple damages in Wisconsin, and all of them survive on plaintiff's death, and survive also on defendant's death, but minus the exemplary damages; and all of them obviously governed by the six-year statute, Subs. 5 and 6, under their plain terms. Appendix A, page 20.[2]

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[2]Unless we write in an exception to Subs. 5 and 6, reading, "except when these actions carry multiple damage." This is obviously no more objectionable than writing in commas.

Therefore, multiple damages can't be penalties in Wisconsin, because *Killen* says penalties die, and that the Survival Statute does not cover them; and multiple damages do not die of themselves, except as against defendant's executor, and the action to which they are annexed does not die at all.

In *Hoskins v. Truax*, *Schiffman v. Texas* and *Sun Theatre Co. v. R.K.O.*, this 7th Circuit had answered critics of those cases by stating that the critics had mis-read its decisions; and that it had not decided nor intended to decide that the Clayton action was penal within federal definition; but solely because Illinois had held all multiple damage actions subject to its two-year statute.

Here, then, we have Congress, since, changing the limitation in the direction of achieving uniformity, after a report by the Attorney General and a Committee on the enforcement of the anti-trust laws, pointed out the need for uniformity in limitations and in survival and assignment of these causes of action. (See *U. S. Congressional & Adm. News*, 84th Congress, page 2333, Senate Report No. 619.)

Here are the 2nd, 4th, 6th, 9th and 10th Circuits, all holding the action not penal; and this same Circuit, the 7th, disclaiming in these three recent cases that it had ever intended to hold the action a penalty; would we not rightly expect one word of explanation for the conclusion that the Clayton action has now become a penalty, especially in view of the *Wogahn* case that a federally created cause of action would be construed in Wisconsin courts *as penal or remedial in accordance with the decisions of federal courts?* And in further view of the fact that unless the action is a penalty, the other or second conclusion as to the comma and the use of the "two words" becomes irrelevant.

In discussing its second postulate, as to the kind of penalty to which the statute applies, since it involves the interpretation of Wisconsin statutes, it would seem that Wiscon-

sin decisions are entitled to first consideration.

Here is *Dutton v. Fowler*, 27 Wis. 427, construing the very two words "penalty or forfeiture" under discussion, and referring to the forfeiture there involved, as "the penalty or forfeiture"; and pointing out for us that "the penalty (in referring to the forfeiture) is given to whosoever will sue for it, and not to the person damaged."

Here is a clear definition by the Wisconsin Court that the penalty referred to in these statutes, to which the two-year statute is a limitation, is one given "to whosoever will sue for it," and not to the person damaged. Is the Clayton action given to "whosoever will sue for it"? Title 15, Sec. 15, *U.S.C.*, doesn't say so, nor do the decisions.

Yet, strange as it seems to us, the court below does not even mention *Dutton v. Fowler*.

Here are the very sections of the Wisconsin Statutes to which the two-year section is the obvious limitation, using the two words "penalty" and "forfeiture" in referring to the same liability. But, strange as it seems, the court below does not even refer to them.

Instead, it decides that because the two words are used, it must go back to an 1887 statute to find a comma between the two words, which comma has never been in print either then or since (Appendix B, page 25), and, although the statute was amended in 1931 without the comma, it decides there is an ambiguity, unless the comma be re-inserted—a procedure in direct conflict with a decision of the Wisconsin Supreme Court, where a Revisor's Bill was also involved, where that Court said:

> "We may not go outside the statute to create ambiguity and then resolve the ambiguity by what we have found outside."

The two-year statute (Appendix A, page 20), is plain and unambiguous. It is crystal clear without the comma. It is

consonant as it reads with *Dutton v. Fowler* and the subsequent decisions. It is in harmony with the statutes creating the liabilities. Why does it need interpretation?[3]

The Supreme Court of Wisconsin in these two cases of *Killen v. Barnes* and *Dutton v. Fowler* came to the same conclusions as did the Court of Appeals of New York in the identically parallel cases of *Merchants Bank v. Bliss* and *Grorer v. Morris*. Page 9 of Petition, footnote 5.

In the three cases from Illinois, this Circuit held the Clayton action within its two-year statute, because Illinois held all multiple damage actions governed by it.

But the Wisconsin Supreme Court says that the character of a federally created action must be determined in accordance with federal law;[4] and federal law up to this decision unanimously holds the Clayton action remedial. Wherein is Wisconsin's voice not as potent as that of Illinois?

Dutton v. Fowler says that penalty and forfeiture both mean penalty, and that the penalty is given to whosoever will sue for it. No one can read that case and dispute that. Why wasn't that decision followed?

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[3]In State ex rel. U. S. S. & G. v. Smith, 184 Wis. 309, the Supreme Court of Wisconsin said:

> "If a statute is plain and unambiguous, then interpretation is unnecessary."

[4]Respondents' Brief in Opposition, at page 12, states:

> "Wogahn v. Stevens involved the survivability of a federally created cause of action, an issue which unlike the question here, is governed by federal law."

This is not true. For Wogahn v. Stevens, 236 Wis. at page 128, says:

> "If remedial * * * it survives * * * if penal in its nature and not remedial * * * it did not survive."

That is, the Wisconsin Supreme Court makes its survivability dependent on its penal or remedial character, and that the characterization by federal courts of a federally created cause of action as **penal or remedial** is governing in Wisconsin Courts.

As the Congressional committee report pointed out (Senate Report No. 619), the application of the varying state limitation laws were frequently dependent on the question whether the cause of action according to state law was remedial or penal; so that under identical facts, the action would survive and be assignable in one jurisdiction and die or be non-assignable in the other. Congress set out to cure this evil by providing a uniform limitation. But the evil of "venue shopping" is still unsolved, as the present case points up. For certainly it is arguable that the Court below acted in accordance with both *Wogahn v. Stevens* and *Prudence Realization v. Geist*, and decided *on federal grounds* that the character of the action is penal because of the treble damage provisions; so that we now have the 7th Circuit holding the action penal on federal grounds, and five circuits holding the character of the action remedial; and on identical facts, the action will survive and be assignable in courts following the five circuits, and die or be non-assignable in those following the 7th Circuit.

That problem, involving the interpretation of the law, is peculiarly a function of the courts that only this Court can solve.

The evil of "venue shopping" is still with us; and a corporation forced out of business and desiring to assign its cause of action will be advised to seek an assignee in a venue holding the action remedial. Or if the injured person die, his executor would be advised to bring his action in the jurisdiction holding the action remedial. If Petitioner here dies, his action terminates as to all defendants. But if brought elsewhere, his action would have survived.

Surely the rule should be uniform throughout the United States.

September 5, 1956.

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